Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has repeatedly held that a state's extraterritorial regulation of the transactions of non-state entities that occur wholly outside its borders is *per se* invalid under the Commerce Clause. *See, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989). The Seventh Circuit has now ruled that a state's interest in protecting utility ratepayers can outweigh the impact on interstate commerce caused by extraterritorial regulation in upholding Wisconsin statutes that prohibit the non-Wisconsin transactions of non-Wisconsin investors that hold as little as a 5% interest in a Wisconsin utility. The Seventh Circuit has further ruled that other Wisconsin statutes that fully protect Wisconsin utility ratepayers, but with no impact on interstate commerce, need not be considered in the balancing analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The questions presented for review are:

1. Are Wisconsin statutes that prohibit transactions that occur outside of Wisconsin between non-Wisconsin entities and a non-Wisconsin investor that owns as little as a 5% interest in a Wisconsin utility subject to *per se* Commerce Clause scrutiny and not subject to the *Pike* balancing analysis?

2. If Wisconsin's regulation of the transactions of non-Wisconsin entities occurring wholly outside Wisconsin is subject to the *Pike* Commerce Clause balancing analysis, must the balance include consideration of other Wisconsin statutes that fully protect ratepayers but without any extraterritorial impact on interstate commerce?

STATEMENT PURSUANT TO RULE 29.6

Alliant Energy Corporation has no parent company and no publicly held company owns ten percent (10%) or more of Alliant Energy Corporation's stock.

TABLE OF CONTENTS

Page

Questions Presented i

Statement Pursuant to Rule 29.6 ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

A. The Challenged Sections of the Wisconsin Utility Holding Company Act 2

B. Proceedings Below 4

Reasons for Granting the Petition 5

I. THE SEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT COMMERCE CLAUSE PRECEDENTS ESTABLISHING THAT STATE EXTRATERRITORIAL REGULATION IS *PER SE* INVALID 7

A. This Court Has Repeatedly Declared A *Per Se* Ban Against Extraterritorial State Regulation Of Interstate Commerce 7

B. The Seventh Circuit's Use Of A Balancing Test To Review Extraterritorial State Legislation Is In Direct Conflict With This Court's And Other Circuit Court Precedents And Creates Confusion As To The Appropriate Test For Extraterritorial State Regulation 14

II. THE DECISION BELOW CONFLICTS WITH THE *PIKE* BALANCING TEST WHICH REQUIRES THAT A COURT CONSIDER OTHER STATE STATUTES THAT FULLY PROTECT THE STATE'S INTEREST WITHOUT BURDENING INTERSTATE COMMERCE 23

III. THE ISSUES IN THIS CASE ARE OF GREAT PRACTICAL IMPORTANCE NOT ONLY TO THE INTERSTATE UTILITY INDUSTRY BUT ALSO TO ALL BUSINESSES ENGAGED IN INTERSTATE TRANSACTIONS BECAUSE THE SEVENTH CIRCUIT DECISION WILL PERMIT INCONSISTENT STATE REGULATION 26

Conclusion 29

Appendix

Appendix A - Seventh Circuit Denial of Rehearing - 07/14/03 . . . . . 1a

Appendix B - Seventh Circuit Opinion - 05/29/03 . . . . . 10a

Appendix C - District Court Memorandum and Order- 05/20/02 . . . . . 38a

Appendix D - Constitutional and Wisconsin Statutory Provisions Involved 55a

TABLE OF AUTHORITIES

Page

Cases

A. S. Goldmen & Co., Inc. v. New Jersey Bureau of Sec.,
163 F.3d 780 (3d Cir. 1999) 13

Alliant Energy Corp. v. Bie,
277 F.3d 916 (7th Cir. 2002) 4

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,
461 U.S. 375 (1983) 6, 19, 22

BMW of North Am. v. Gore,
517 U.S. 559 (1996) 16

Brown-Forman Distillers Corp. v. New York State Liquor Auth.,
476 U.S. 573 (1986) . . . . . passim

CTS Corp. v. Dynamics Corp. of Am.,
481 U.S. 69 (1987) 11, 14, 17, 22

Dean Foods Co. v. Brancel,
187 F.3d 609 (7th Cir. 1999) 5

Edgar v. MITE Corp., 457 U.S. 624 (1982) . . . . . passim

Government Suppliers Consolidating Serv., Inc. v. Bayh,
975 F.2d 1267 (7th Cir. 1992) 23

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) . . . passim

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 17, 18, 23

National Collegiate Athletics Ass'n v. Miller,
10 F.3d 633 (9th Cir. 1993) 8

National Solid Wastes Mgmt. Ass'n v. Meyer,
63 F.3d 652 (7th Cir. 1995),
cert. denied, 517 U.S. 1119 (1996) 8, 13, 23, 24

Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n,
772 F.2d 404 (8th Cir. 1985) 19

New England Power Co. v. New Hampshire,
455 U.S. 331 (1982) 19

Pharmaceutical Research and Mfrs. of Am. v. Concannon,
249 F.3d 66 (1st Cir. 2001),
aff'd sub nom. Pharmaceutical Research and Mfrs. of Am. v. Walsh,
123 S. Ct. 1855 (2003) 8, 13

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) . . . . . passim

Southern Union Co. v. Missouri Pub. Serv. Comm'n,
289 F.3d 503 (8th Cir. 2002) 20, 21

Constitutional Provision and Statutes

U.S. Const. Art. I, § 8, cl.3 . . . . . 1, 7

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 2

Wis. Stat. § 196.795(1)(h) 1, 2
Wis. Stat. § 196.795(3) 1, 2
Wis. Stat. § 196.795(4) 25
Wis. Stat. § 196.795(5)(c) 25
Wis. Stat. § 196.795(5)(d) 25
Wis. Stat. § 196.795(5)(f) 25
Wis. Stat. § 196.795(5)(g) 25
Wis. Stat. § 196.795(5)(L) 1, 2
Wis. Stat. § 196.795(6m) 1, 3
Wis. Stat. § 196.795(7)(a) 1, 3
Wis. Stat. § 196.795(7)(c) 25
Wis. Stat. § 201.01(2) 1, 3
Wis. Stat. § 201.03 . . . . . 1, 3, 22
Wis. Stat. § 201.05 . . . . . 1, 3
Wis. Stat. § 201.06 1
Wis. Stat. § 201.09 . . . . . 1, 3
Wis. Stat. § 201.11 . . . . . 1, 3, 22
Wis. Stat. § 201.13 . . . . . 1, 4, 22

Other Authority

Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987) 17

PETITION FOR WRIT OF CERTIORARI

Petitioner Alliant Energy Corporation ("AEC") respectfully petitions for a writ of certiorari to review Parts II.b. and II.b.iii. of the Seventh Circuit's decision and the reasoning set forth in its rehearing decision.

OPINIONS BELOW

The Seventh Circuit's decision, *see* Appendix ("App.") at 10a-37a, is reported at 330 F.3d 904 and the rehearing opinion, *see* App. at 1a-9a, is reported at 336 F.3d 545. The United States District Court for the Western District of Wisconsin's decision, *see* App. at 38a-54a, is unreported.

JURISDICTION

The Seventh Circuit's decision was entered on May 29, 2003. A timely petition for rehearing *en banc* was denied by the Seventh Circuit on July 14, 2003. App. at 1a-9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are: the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3 (the "Commerce Clause"); and the following Wisconsin statutes: Wis. Stat. §§ 196.795(1)(h), 196.795(3), 196.795(5)(L), 196.795(6m), 196.795(7)(a), 201.01(2), 201.03, 201.05, 201.06, 201.09, 201.11, and 201.13. App. at 55a-71a.

STATEMENT OF THE CASE

AEC challenged the validity of Wisconsin statutes under, *inter alia,* the Commerce Clause. The district court's jurisdiction was invoked under 28 U.S.C. § 1331.

A. The Challenged Sections of the Wisconsin Utility Holding Company Act

The Wisconsin Utility Holding Company Act, Wis. Stat. § 196.795, *et seq.* ("WUHCA"), regulates Wisconsin non-telecommunications public utility holding companies. A holding company is defined as "[a]ny company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities." Wis. Stat. § 196.795(1)(h)1.a. Any person determined by the Public Service Commission of Wisconsin ("PSC") to exercise a controlling interest over a Wisconsin public utility may also be deemed to be a holding company. *See* Wis. Stat. § 196.795(1)(h)1.b.

Prior to this case, any holding company governed by WUHCA was required to be incorporated in Wisconsin. *See* Wis. Stat. § 196.795(5)(L) (the "In-State Incorporation Statute"). That statute was declared unconstitutional by the Seventh Circuit. App. at 21a-26a. WUHCA now applies to both Wisconsin and non-Wisconsin entities that meet WUHCA's definition of a holding company.

WUHCA provides that no person may "take, hold or acquire, directly or indirectly," more than 10% of the shares of a holding company without PSC approval. Wis. Stat. § 196.795(3) (the "Takeover Statute"). Thus, no non-

Wisconsin entity can acquire 10% or more of the shares of a non-Wisconsin company owning as little as a 5% interest in a Wisconsin public utility without prior PSC approval.

WUHCA also limits a holding company's non-utility investments to approximately 25% of the utility assets in the holding company system. *See* Wis. Stat. § 196.795(6m)(b) (the "Asset Cap"). Once the Asset Cap has been reached, a non-Wisconsin holding company cannot purchase any non-utility assets. For example, an Indiana company holding a 5% interest in a Wisconsin public utility cannot purchase an Indiana healthcare facility if its other non-utility assets have reached the Asset Cap.

If any of a holding company's non-utility affiliates does not, or cannot reasonably be expected to, conduct business in one of four narrowly defined areas generally related to energy conservation, utility services or business generation in Wisconsin, the holding company is deemed to be a "public service corporation." Wis. Stat. §§ 196.795(7)(a) and 201.01(2) (the "PSC Securities Regulation Statutes"). As a public service corporation, a non-Wisconsin holding company cannot raise capital by selling its securities without prior PSC approval and then only in an amount and for a purpose approved by the PSC. *See* Wis. Stat. §§ 201.03 and 201.05. Thus, if a non-Wisconsin holding company wishes to sell stock to non-Wisconsin residents to raise capital to enter into a transaction outside of Wisconsin, it cannot do so without prior PSC approval. If it does, the holding company is required to forfeit to the State of Wisconsin up to $10,000 for each offense. *See* Wis. Stat. § 201.09(1). The PSC can also order a non-Wisconsin holding company not to pay dividends to its shareholders if the PSC finds its capital to be impaired. *See* Wis. Stat. § 201.11. Finally, all of a non-Wisconsin

holding company's stock is required to be governed by Wisconsin law, Wis. Stat. Ch. 180. *See* Wis. Stat. § 201.13.

B. Proceedings Below

In October 2000, AEC, a Wisconsin utility holding company, and its wholly owned public utility subsidiary, Wisconsin Power and Light Company ("WPL"), filed an action against the PSC Commissioners in the United States District Court for the Western District of Wisconsin asserting, *inter alia*, that the In-State Incorporation Statute, the Takeover Statute, the Asset Cap and the PSC Securities Regulation Statutes are *per se* invalid because they directly regulate interstate commerce in violation of the Commerce Clause prohibition against extraterritorial state regulation. AEC also argued that the challenged WUHCA provisions fail the *Pike* Commerce Clause balancing test.

The district court upheld the challenged WUHCA statutes.[1] App. at 38a-54a. AEC appealed, and on May 29, 2003, the Seventh Circuit reversed the district court's ruling on the In-State Incorporation Statute, holding that it violated the Commerce Clause. App. at 21a-26a. The Seventh Circuit affirmed the district court's decision that the other challenged statutes are constitutional. App. at 26a-37a.

The Seventh Circuit acknowledged that, in the absence of the In-State Incorporation Statute, the remaining challenged statutes regulate interstate transactions outside of Wisconsin's borders. Notably, the Seventh Circuit stated that "[w]e have

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[1] The district court first ruled that AEC and WPL lacked standing and dismissed the case. That ruling was reversed by the Seventh Circuit. *See Alliant Energy Corp. v. Bie*, 277 F.3d 916 (7th Cir. 2002).

no doubt that the provisions do in fact impact extraterritorial commerce" and noted that application of *per se* scrutiny "would mean victory for [AEC]. . . ." App. at 31a. The Seventh Circuit did not, however, apply *per se* Commerce Clause scrutiny because it found that any burden on interstate commerce was indirect. App. at 31a. The Seventh Circuit instead upheld the challenged statutes under the *Pike* balancing test, reasoning that Wisconsin's strong interest in protecting ratepayers outweighed the extraterritorial restraint on interstate commerce. App. at 32a-33a.

AEC sought an *en banc* rehearing based on a prior decision of the Seventh Circuit, which directly conflicts with the court's rejection here of *per se* scrutiny of extraterritorial state regulations. Four years earlier in *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-16 (7th Cir. 1999), the Seventh Circuit noted "the long-established core principle that a statute or regulation that violates the extraterritorial ban is per se invalid" and declared that Seventh Circuit "cases have hewed to the per se rule. . . ." Denying AEC's rehearing petition on July 14, 2003, the Seventh Circuit described its statements in *Dean Foods* as being mere *dicta*. App. at 6a. The Seventh Circuit stated that only direct extraterritorial regulation warrants *per se* scrutiny whereas indirect extraterritorial regulation should be reviewed under the *Pike* balancing test. App. at 6a-7a.

REASONS FOR GRANTING THE PETITION

Since 1995, utilities and utility holding companies have been consolidating and growing in size due to their ability to obtain interstate investment capital and through interstate investment diversification. *See* Part III, *infra*. The interstate utility market has thus determined that the most efficient way to ensure delivery of reliable electric services in the United

States is through such consolidation. The Seventh Circuit acknowledged that the challenged WUHCA statutes will prevent these interstate utility investment and diversification transactions. App. at 32a. Given the current nationwide controversy and debate over power generation, transmission and reliability, if the Seventh Circuit's decision stands, other states can enact WUHCA-like laws to restrict the interstate investment activities of out-of-state diversified holding companies with investments in in-state utilities to further each state's parochial interests. States rarely have the same local interests and inconsistent, conflicting state regulation of the interstate utility industry would almost be a certainty, thereby further disrupting the market-directed trend toward interstate utility consolidation.

The decision below encourages this result by directly conflicting with this Court's long-standing extraterritorial Commerce Clause principle: a state cannot regulate commercial transactions between out-of-state entities that occur outside its borders. This Court has repeatedly held that such regulation is *per se* violative of the Commerce Clause even when the regulation applies on its face to both in-state and out-of-state entities. *See generally Healy,* 491 U.S. at 331-40; *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986). Despite this Court's directive in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 391 (1983), that state utility regulation is not exempt from normal Commerce Clause scrutiny, the Seventh Circuit has seemingly carved out an exception to the Commerce Clause extraterritoriality principle for state utility holding company regulation. Expressly recognizing that the WUHCA statutes regulate interstate commerce extraterritorially, the Seventh Circuit nonetheless applied the *Pike* balancing test and held that Wisconsin's interest in protecting utility ratepayers allows Wisconsin to

regulate the non-Wisconsin transactions of non-Wisconsin holding company investors in Wisconsin utilities. Additionally, in conflict with *Pike* and its progeny, the Seventh Circuit refused to consider other WUHCA statutes that fully protect Wisconsin ratepayers with no extraterritorial impact. Labeling those alternative statutes as permissible "backup" regulation, the court did not weigh them in the *Pike* balance against what it described as "no small impact" on interstate commerce, thereby eliminating an essential element of the *Pike* analysis. App. at 35a-36a.

This Court should grant the Petition to eliminate any confusion as to the extraterritorial *per se* Commerce Clause scrutiny applicable to all interstate commerce, including the utility industry, and to reemphasize that alternative, fully-protective state regulation with no impact on interstate commerce must be considered under *Pike*. Otherwise, the Seventh Circuit's decision will permit the very type of inconsistent state extraterritorial regulation the Commerce Clause was meant to prevent.

I. THE SEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT COMMERCE CLAUSE PRECEDENTS ESTABLISHING THAT STATE EXTRATERRITORIAL REGULATION IS *PER SE* INVALID

A. This Court Has Repeatedly Declared A *Per Se* Ban Against Extraterritorial State Regulation Of Interstate Commerce

The Commerce Clause provides that "Congress shall have the power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, sec. 8, cl. 3. The Court has

developed two lines of Commerce Clause analysis. The first, *per se* invalidity analysis, applies where a state law: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests.[2] *See Brown-Forman,* 476 U.S. at 579-80; *National Collegiate Athletics Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). When a state law regulates transactions between non-state entities occurring wholly outside the state, such extraterritorial state law regulates interstate commerce directly and is *per se* invalid. *See Brown-Forman,* 476 U.S. at 579-82. Additionally: "When a state statute . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court generally has 'struck down the statute without further inquiry.'" *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (quoting *Brown-Forman*, 476 U.S. at 579), *cert. denied*, 517 U.S. 1119 (1996). Extraterritorial regulation by a state, even if the statute also has effects within the state, is always *per se* invalid. *See Healy*, 491 U.S. at 335-37; *Pharmaceutical Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001), *aff'd sub nom. Pharmaceutical Research and Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855 (2003).

The extraterritoriality principle has consistently been applied to strike down state legislation that directly regulates interstate transactions occurring wholly outside the state. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), this Court declared the Illinois Business Take-Over Act, a statute very similar to the WUHCA Takeover Statute, invalid. The

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[2] The second Commerce Clause test, the *Pike* balancing analysis used to review state laws that regulate in-state transactions evenhandedly but affect interstate commerce indirectly, is discussed in Part II, *infra*.

Illinois Act required registration approved by the Illinois Secretary of State of any takeover offer for the shares of any corporation with at least 10% Illinois shareholders, or where two of the following three conditions existed: the company had a principal office in Illinois, the company was organized under Illinois law, or the target company had at least 10% of its stated capital and paid-in surplus in Illinois. Like the WUHCA Takeover Statute, the Illinois Act applied evenhandedly to Illinois and non-Illinois corporations. *See id.* at 626-27.

A plurality of the *Edgar* Court applied *per se* scrutiny, reasoning that the Illinois Act regulated interstate commerce directly because it allowed Illinois to block stock transfers between a non-Illinois corporation and non-Illinois stockholders:

> The Illinois Act. . . directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. . . . Indeed, the Illinois law on its face would apply even if not a single one of [the target's] shareholders were a resident of Illinois. . . .
>
> It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. . . . The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the

> State's borders, whether or not the commerce has effects within the State.[3]

457 U.S. at 641-43 (White, J., plurality) (internal citation omitted). The *Edgar* plurality found the Illinois Act, which applied equally to Illinois and out-of-state corporations, *per se* invalid. *See id.*

Four years later, the Court again considered extraterritorial legislation in *Brown-Forman,* 476 U.S. at 573. New York's price affirmation law required any distiller who sold to wholesalers in New York to file a price schedule and affirm that in the following month it would not sell its products anywhere at a lower price. Violations of the affirmation statement were punishable by revocation of the distiller's New York license and by forfeiture of the seller's bond. The law applied evenhandedly to distillers in New York and outside of New York. Nonetheless, because the law applied to a non-New York distiller's sales outside of New York, it was declared *per se* invalid as extraterritorial regulation:

> Appellant does not dispute that New York's affirmation law regulates all distillers of intoxicating liquors evenhandedly, or that the State's asserted interest -- to assure the lowest possible prices for its residents -- is legitimate. Appellant contends that these factors are irrelevant, however, because the . . .

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[3] The Seventh Circuit acknowledged that this last sentence, "if controlling, would mean victory for Alliant. . . ." App. at 31a. The court reasoned that it was not controlling because it was only part of the plurality opinion. App. at 31a-32a. As the following discussion in the text demonstrates, however, that very language has been repeated by this Court in reliance on the *Edgar* plurality.

> ABC Law falls within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids. This is so, appellant contends, because the ABC Law effectively regulates the price at which liquor is sold in other States . . . .
>
> * * *
>
> Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. *Edgar v. MITE Corp.*, 457 US, at 642, 73 L Ed 2d 269, 102 S Ct 2629 (plurality opinion). . . .
>
> * * *
>
> Thus, New York has "project[ed] its legislation" into other States, and directly regulated commerce therein, in violation of [the Commerce Clause].

Id. at 579-80, 582-84 and n. 6.

The next year, the Court confronted another Commerce Clause challenge in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987). Under the Indiana Control Share Acquisitions Act, acquisition of a target company's control shares did not result in acquisition of voting rights unless the disinterested shareholders conferred voting rights on the control shares. If they did not, the target company could redeem the control shares from the tender offeror. *See id.* at 73-75. The Indiana Act applied only to corporations incorporated in Indiana. *See id.* at 72-73.

Reasoning that Indiana had the power to regulate the internal affairs of Indiana corporations, the Court determined

that the Indiana Act did not violate the "inconsistent regulation" element of the extraterritoriality principle:

> The Indiana Act poses no such problem [of inconsistent state regulation]. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. . . .

Id. at 89. The Court distinguished the Indiana Act from the Illinois statute found unconstitutional in *Edgar* on the basis that the Indiana Act applied only to Indiana corporations, whereas the Illinois Act regulated Illinois corporations *and* the transactions of non-Illinois corporations wholly outside of Illinois. *See id.* at 93. Based on the Indiana Act's intrastate scope and Indiana's power to regulate the internal affairs of its own corporations, the Court upheld the Act. *See id.* at 94.

Two years later in *Healy*, 491 U.S. at 324, the Court expressly defined the contours of the Commerce Clause extraterritoriality principle:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, *the "Commerce Clause. . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or*

> *not the commerce has effects within the State*". . . .[4] Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. . . . And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

Id. at 336-37 (internal citations omitted) (emphasis added). Because the Connecticut statute in *Healy* had the practical effect of controlling wholesale beer prices in other states, the Court found the law *per se* invalid. *See id.* at 337-40, 343. *See also Pharmaceutical Research and Mfrs. of Am.*, 249 F.3d at 79; *A. S. Goldmen & Co., Inc. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 786 (3d Cir. 1999). Before this case, the Seventh Circuit also recognized the extraterritorial *per se* principle. *See Meyer*, 63 F.3d at 658-659 ("*Healy* is consistent with a long line of cases that . . . make clear that

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[4] This is the very language found not to be controlling by the Seventh Circuit because it was part of the *Edgar* plurality decision. App. at 31a.

the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state.").

The line of reasoning in the plurality opinion in *Edgar, Brown-Forman, CTS* and *Healy*, establishes that a state cannot regulate transactions occurring wholly outside the state no matter how important the state interest sought to be protected and even if the legislation applies evenhandedly to in-state and out-of-state entities. In conflict with this Court's holdings, the Seventh Circuit used the *Pike* balancing test for Commerce Clause scrutiny of the Wisconsin extraterritorial statutes. If that analysis were allowed to stand, it would expand a state's authority to regulate interstate commerce beyond the state's borders and subject businesses operating in interstate commerce to the danger of inconsistent state regulation, which the Commerce Clause extraterritorial principle is designed to prevent.

B. The Seventh Circuit's Use Of A Balancing Test To Review Extraterritorial State Legislation Is In Direct Conflict With This Court's And Other Circuit Court Precedents And Creates Confusion As To The Appropriate Test For Extraterritorial State Regulation

The Seventh Circuit recognized that, in the absence of the In-State Incorporation Statute, the challenged statutes regulate transactions between non-Wisconsin entities occurring wholly outside Wisconsin:

> In fact, given the invalidation of the in-state incorporation provision, some transactions regulated by the [] [Takeover Statute, Asset Cap and PSC Securities Regulation Statutes] may occur entirely

> outside of Wisconsin. For example, an Illinois corporation that owns a Wisconsin utility would be subject to Wisconsin regulation if it wished to sell 10% of its stock to an Indiana corporation or if it decided to diversify and purchase non-utility assets located in various States that amounted to greater than 25% of its worth. Such transactions are no doubt interstate in nature.

App. at 30a-31a. Nonetheless, the Seventh Circuit reasoned that, because the statutes regulate in-state and out-of-state entities evenhandedly, the extraterritorial burden on interstate commerce is indirect and incidental so that *per se* scrutiny is inappropriate. App. at 4a and 31a. The Seventh Circuit's analysis is succinctly set forth in its opinion denying rehearing:

> Under interstate commerce analysis we apply a two-tiered test. If the statute in question facially or directly discriminates against or regulates interstate commerce, it is "virtually *per se*" invalid -- such a statute can only be saved by passing the strictest of scrutiny. On the other hand if the statute's effects on interstate commerce are only incidental or indirect and apply evenhandedly, we apply the balancing test established in *Pike*. . . . This is a somewhat general overview and we note in our original opinion that there is no clear line separating the statute's [*sic*] that will be *per se* invalid and those that will be subject to the *Pike* balancing test. . . .
>
> But what about extraterritorial regulation? Appellants suggest that a different standard should be applied. They suggest that regardless of the beneficial effects a statute has on local activity it should be

> declared invalid if it has *any* extraterritorial effects. . . . This position is not sustainable. It is not clear why the inquiry would be any different.

App. at 2a-3a.

Notwithstanding the Seventh Circuit's reasoning, AEC is not seeking a different standard but rather application of this Court's extraterritoriality standard. *Per se* Commerce Clause scrutiny always applies and always invalidates a state statute that regulates the activities of non-state entities occurring wholly outside the state's borders because such a statute is a "direct" regulation of interstate commerce. Moreover, there is a clear reason why that is: under our system of federalism, a state has no power to regulate activities occurring wholly outside its borders. *See BMW of North Am. v. Gore*, 517 U.S. 559, 570-72 (1996).

That is not to say that any statute with an extraterritorial *effect* is subject to *per se* scrutiny. In its discussion of direct/indirect impacts, the Seventh Circuit confused state regulation of extraterritorial *behavior* with state regulation of in-state behavior that results in an extraterritorial *effect*.

> States may have some power to legislate extraterritorially where the behavior of their own citizens is concerned. But not, plainly, when they try to legislate for non-citizens. . . .
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> * * *
>
> [T]he extraterritoriality principle is not about the location of the effects of the regulated behavior. It is about the location of the regulated behavior itself. . . .

Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1874, 1889, 1899 (1987). *See also A.S. Goldman*, 163 F.3d at 786 (relying on the reasoning of the plurality in *Edgar* and the Court in *CTS* and stating: "If the transaction to be regulated occurs 'wholly outside' the boundaries of the state, the regulation is unconstitutional. . . . If the transaction occurs 'within' the boundaries of the state, it is constitutional so long as the regulation furthers legitimate in-state interests.").

A case in point is *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). In *Clover Leaf*, a Minnesota statute banned the use of plastic non-returnable milk containers in Minnesota. The statute applied to Minnesota and non-Minnesota businesses that sold milk in Minnesota. The Court concluded that, because the statute applied evenhandedly, its impact on interstate commerce was only indirect, and it was thus subject to the *Pike* analysis. *See id.* at 471-73. This was so even though the statute had extraterritorial *effects* on the manufacturing and packaging decisions of businesses outside of Minnesota. *See id.* Yet, the location of the behavior being regulated was the sale of milk *within* Minnesota. Thus, the extraterritorial effect did not call for extraterritorial *per se* scrutiny because the regulated behavior occurred only in Minnesota. *See id.*

If the Minnesota statute in *Clover Leaf* also prohibited the sale of milk in plastic non-returnable containers in Iowa by both Minnesota and non-Minnesota businesses selling milk in Minnesota, Minnesota would be exceeding its power because it would be prohibiting non-Minnesota businesses from selling their products outside the state of Minnesota. That would be true even though the statute applied evenhandedly to

Minnesota and non-Minnesota sellers because the location of the behavior being regulated in the hypothetical is outside of Minnesota. While the Minnesota interest in preventing plastic milk containers from taking up scarce landfill resources is considered under the *Pike* analysis of Minnesota's evenhanded regulation of in-state milk sales, that state interest is irrelevant if Minnesota were to try to prohibit conduct taking place outside its borders.[5]

Nor can it be said that evenhandedness is a consideration other than in Commerce Clause scrutiny of cases alleging discrimination against foreign corporations. State statutes regulating transactions by non-state entities wholly outside the state are *per se* invalid as direct interstate regulation even if they apply evenhandedly to in-state and out-of-state entities. *See Edgar* (plurality), *supra; Brown-Forman, supra; Healy, supra.* State statutes that regulate behavior within the state but discriminate against foreign corporations are subject to *per se* scrutiny and almost always invalid. State statutes that regulate behavior within the state and that apply evenhandedly but with extraterritorial effects are considered to regulate interstate commerce only indirectly and, thus, are subject to the *Pike* balancing test. *See Clover Leaf, supra.*

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[5] In justifying its rejection of *per se* scrutiny, the Seventh Circuit reasoned that a non-Wisconsin holding company's investment in a Wisconsin public utility meant that "[e]very application of the Wisconsin Act will affect a substantial number of Wisconsin resident [ratepayers]." App. at 9a. Every application of the price affirmation statute in *Healy* surely affected a substantial number of Connecticut consumers, yet this Court still invalidated the Connecticut statute for regulating extraterritorially: "[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State.*'" *Healy*, 491 U.S. at 336 (citing the *Edgar* plurality) (emphasis added).

The Seventh Circuit effectively carved out an exception to extraterritorial Commerce Clause analysis for state regulation of utility holding companies by declaring that such regulation is subject to a balancing test:

> A State is entitled to regulate the financial structure and investments of companies that control utilities in that State; otherwise it would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, however significant it may be, is not enough to *outweigh* this interest.

App. at 34a (emphasis added). That utility exception to the Commerce Clause extraterritorial analysis ignores this Court's contrary directive in *Arkansas Elec.*, 461 U.S. at 391: "[The Court's] constitutional review of state utility regulation . . . has not treated it as a special province insulated from our general Commerce Clause jurisprudence."[6]

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[6] Although the *Arkansas Electric* Court upheld the Arkansas Public Service Commission's power to regulate wholesale electricity rates under *Pike*, it did so only because the regulated activity was located in Arkansas. *See Arkansas Elec.*, 461 U.S. at 394. This Court and circuit courts have held elsewhere that utility regulation does not merit special Commerce Clause treatment. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (order by the New Hampshire Public Utilities Commission prohibiting an in-state utility from selling electricity out-of-state to protect in-state utility customers declared *per se* invalid under Commerce Clause); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985) (Arkansas Public Service Commission attempt to cancel an in-state utility's contracts to purchase power outside of Arkansas so as to protect Arkansas utility customers against rate increases ruled *per se* invalid under the Commerce Clause).

The Seventh Circuit is not the only court recently to misapply the Commerce Clause extraterritorial analysis to utility regulation. In *Southern Union Co. v. Missouri Pub. Serv. Comm'n,* 289 F.3d 503 (8th Cir. 2002), the Eighth Circuit similarly carved out a utility exception to extraterritorial Commerce Clause analysis. Southern Union, a regional public utility operating in Missouri, but incorporated in Delaware with it principal place of business in Texas, raised a Commerce Clause challenge against a Missouri statute that required public utilities conducting business in the State to receive prior approval from the Missouri Public Service Commission ("MPSC") before purchasing stocks or bonds issued by another utility. *See id.* at 505. Southern Union argued that the Missouri statute was *per se* violative of the Commerce Clause because it was a Delaware corporation and the statute regulated its interstate stock transactions that would occur wholly outside Missouri. *See id.* at 507. Like the Seventh Circuit, although the Eighth Circuit recognized that the Missouri statute extraterritorially regulated interstate stock purchases, it rejected the application of *per se* scrutiny because the statute applied evenhandedly and pertained to local utility regulation:

> Using terminology from some of the Supreme Court's Commerce Clause opinions, Southern Union asserts that [the Missouri statute] is per se invalid because it is both "extraterritorial" and "direct" regulation of interstate commerce. Southern Union cites no authority supporting this contention in the context of public utility regulation.
>
> * * *
>
> Though Southern Union's stock purchases are no doubt conducted from its corporate headquarters in

> Texas, the Commission scrutinizes these transactions because they potentially affect the company's regulated rate of return in Missouri. . . . [C]alling this "direct" regulation of interstate commerce does not make it per se unlawful. . . . Here, no discrimination against interstate commerce, or other form of "economic protectionism," is at work . . . .

Id. at 507-08.[7]

The Eighth Circuit in *Southern Union* and the Seventh Circuit appear to misunderstand this Court's extraterritoriality principle. The *Southern Union* court reasoned that *per se* scrutiny did not apply because the Missouri statute did not discriminate against foreign entities and did not constitute economic protectionism. Yet, those two *per se* grounds are distinct from the additional extraterritoriality *per se* ground. *See Healy, supra; Brown-Forman, supra.* Moreover, both the Eighth and Seventh Circuits reasoned that, even though the Missouri and Wisconsin Statutes applied extraterritorially to the transactions of non-state entities, because they were evenhanded the *Pike* analysis was appropriate, which is also in conflict with this Court's extraterritoriality cases. *See id.* Or, because of the recent national debate over electric reliability, *see* Part III, *infra*, the Eighth and Seventh Circuits

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[7] The *Southern Union* court considered the Missouri statute to be regulating "a local public utility for the protection of local Missouri ratepayers" even though Southern Union was a Delaware corporation that had headquarters in Texas. *See Southern Union,* 289 F.3d at 508. If there were a special exception to regulation of local utilities, however, that would not apply to the challenged Wisconsin statutes that regulate *investors* in Wisconsin public utilities rather than companies that actually provide utility services.

believe that utility regulation is entitled to an entirely different extraterritorial scrutiny under the Commerce Clause. If so, they are ignoring this Court's contrary directive in *Arkansas Elec.*, 461 U.S. at 391-92.

AEC has never disputed Wisconsin's interest in ensuring the safe and reliable delivery of electricity at reasonable rates to Wisconsin citizens. The legitimacy of that state interest, however, does not somehow weigh in a balance to determine whether Wisconsin can regulate transactions wholly outside its borders. If Wisconsin is concerned with the rates charged by WPL, it can, and does, regulate ratemaking inside of Wisconsin. It cannot, however, extraterritorially regulate interstate transactions because it is concerned that those transactions may somehow affect rates in Wisconsin, such as prohibiting non-Wisconsin investments by a non-Wisconsin entity owning 5% of a Wisconsin utility. *See* the Asset Cap. Nor can Wisconsin prohibit a non-Wisconsin holding company from issuing stock in any amount and for any purpose not approved by the PSC or prohibit the non-Wisconsin holding company from selling its stock to non-Wisconsin citizens to raise capital for non-Wisconsin investments. And Wisconsin cannot prohibit a non-Wisconsin holding company from paying dividends to its stockholders or require that its stock comply with Wisconsin corporate law. *See* PSC Securities Regulation Statutes and Wis. Stat. §§ 201.03, 201.11 and 201.13. *Cf. CTS,* 481 U.S. at 89 ("No principle of corporation law . . . is more firmly established than a State's authority to regulate domestic corporations. . . ."). The Seventh Circuit's holding that such regulation only indirectly burdens interstate commerce directly contradicts the teachings of this Court in the *Edgar* (plurality), *Brown-Forman, CTS* and *Healy* cases. That conflict can only be removed by this Court's review.

II. THE DECISION BELOW CONFLICTS WITH THE *PIKE* BALANCING TEST WHICH REQUIRES THAT A COURT CONSIDER OTHER STATE STATUTES THAT FULLY PROTECT THE STATE'S INTEREST WITHOUT BURDENING INTERSTATE COMMERCE

Even if the Seventh Circuit's application of *Pike* were correct, its decision should still be reviewed because the court altered the *Pike* balancing analysis. The *Pike* balance weighs the local state interest against the burden on interstate commerce. *See Pike,* 397 U.S. at 142: "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities.*" *Id.* (emphasis added); *see also Clover Leaf*, 449 U.S. at 473-74 (upholding Minnesota statute under *Pike* in part because "no approach with 'a lesser impact on interstate activities' . . . [was] available").

In *Meyer*, after determining that the Wisconsin solid waste legislation was *per se* invalid because it regulated extraterritorially, the Seventh Circuit also considered its validity under *Pike*. *See Meyer*, 63 F.3d at 661. The Seventh Circuit found that the "solid waste legislation itself [made] clear that there [was] an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan." *Id.* at 662. Because of the existence of less burdensome regulatory alternatives, the Seventh Circuit held that the Wisconsin legislation failed the *Pike* balancing test. *See id.* at 662-63. *See also Government Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267, 1277 (7th Cir. 1992) (whether the burden imposed on interstate commerce will withstand the *Pike* test depends in

part on "whether [the state interest] could be promoted as well with a lesser impact on interstate activities.").

Thus, prior to the decision below, the Seventh Circuit interpreted *Pike* to require consideration of less burdensome regulatory measures when weighing a challenged legislation's indirect impact on interstate commerce. In its *Pike* analysis, the Seventh Circuit concluded that the challenged statutes imposed significant burdens on interstate commerce:

> The burden on one side is, as we have stated, the effect the statute[s] have on interstate financial transactions. This is no small impact. Certain interstate financial transactions of non-Wisconsin parties are subject to the approval of the PSC while other such transactions are banned outright. This places a high, sometimes prohibitive, transaction[] cost on these dealings.

App. at 32a. Yet, the Seventh Circuit refused to consider whether Wisconsin's interest in protecting utility ratepayers is being fully protected by unchallenged WUHCA regulations that do not burden interstate commerce. Instead, the Seventh Circuit concluded that the challenged statutes were "serving a legitimate purpose when [a State] passes structural regulations to serve as a back up to [other statutory] prohibitions [regulating the same conduct]." App. at 35a-36a. The Seventh Circuit's conclusory statement eliminates that portion of the *Pike* analysis requiring consideration of whether a state interest "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

As in *Meyer*, Wisconsin has other means available to protect its legitimate interests in this area that do not impact interstate commerce. The alleged dangers of holding

companies as identified by the Seventh Circuit, cross-subsidization and deceptive reporting of cost allocation, *see* App. at 32a-33a, are directly prohibited by other, unchallenged WUHCA provisions. In the absence of the challenged statutes, the PSC will retain the authority to prohibit WPL from transferring any money, such as the payment of dividends, to AEC if doing so would impair WPL's capital. *See* Wis. Stat. § 196.795(4). Cross-subsidization is expressly prohibited and subject to PSC regulation. *See* Wis. Stat. § 196.795(5)(f). WUHCA would still prohibit a utility holding company from operating in such a way as to impair the utility's credit. *See* Wis. Stat. § 196.795(5)(g). A Wisconsin utility could not lend money to the holding company's nonutility entities and could not guarantee the obligations of any nonutility affiliate in the holding company system. *See* Wis. Stat. §§ 196.795(5)(c) and (d). Indeed, the PSC retains the ultimate regulatory authority to protect the utility's ratepayers against cross-subsidization or other abuse: the power to order the holding company to divest its interest in the Wisconsin utility to protect ratepayers. *See* Wis. Stat. § 196.795(7)(c).

These unchallenged WUHCA statutes isolate a Wisconsin utility from its holding company parent, ensuring that no money can go from the utility to any other entity, including the holding company, and no holding company costs or financial losses are passed through to utility customers in rates without PSC review and approval. And, unlike the challenged WUHCA provisions, they do not regulate extraterritorial commerce.

When a court determines that state legislation regulates in-state behavior evenhandedly but still burdens interstate commerce, *Pike* and its progeny require a court to consider whether a state could regulate in a less restrictive manner.

The Seventh Circuit changed the *Pike* balancing test by holding that, where the asserted state interest is sufficiently strong, the availability of less restrictive regulatory alternatives need not be considered other than as permissible duplicative backup. This Court should grant the Petition to remove any doubt about the requirement of a court to consider less restrictive regulatory alternatives in the *Pike* balancing test.

III. THE ISSUES IN THIS CASE ARE OF GREAT PRACTICAL IMPORTANCE NOT ONLY TO THE INTERSTATE UTILITY INDUSTRY BUT ALSO TO ALL BUSINESSES ENGAGED IN INTERSTATE TRANSACTIONS BECAUSE THE SEVENTH CIRCUIT DECISION WILL PERMIT INCONSISTENT STATE REGULATION

Since 1995, the utility industry has been consolidating and marked by growth in the size of utilities and utility holding companies due to their ability to better obtain investment capital in interstate commerce, through diversification in their investments and through mergers and acquisitions ("M&A"). N.R. 078 at ¶ 20 and Exh. C; N.R. 081 at ¶ 14; N.R. 077 at ¶¶ 12, 13 and 18. The utility market is also experiencing the entry of investors with diversified holdings and companies outside the United States. N.R. 078 at ¶¶ 8 and 15; N.R. 081 at ¶¶ 11, 14-15. To participate in this rapidly changing interstate market, utility holding companies like AEC must grow by attracting interstate investors. N.R. 078 at ¶¶ 21-28 and Exh. E; N.R. 077 at ¶ 35; N.R. 082 at ¶ 38.

The Seventh Circuit recognized that the challenged statutes will directly interfere with the trend of consolidation in the national utility market. App. at 32a ("Certain interstate financial transactions of non-Wisconsin parties are subject to

approval of the PSC while other such transactions are banned outright. This places a high, sometimes prohibitive, transaction cost on these dealings.").[8] Diversified investors will not divest of their non-utility holdings to the level of the Asset Cap as a cost of the transaction with a WUHCA-governed holding company. N.R. 078 ¶¶ 13-14. They will not agree to invest the substantial time and money in a transaction with a WUHCA-governed holding company faced with the uncertainty of whether the transaction will be approved by the PSC and then, even if approved, the uncertainty of whether they would receive PSC approval sometime in the future to sell 10% or more of their shares. N.R. 078 ¶¶ 10-12. The risk that a non-Wisconsin investor would have its future stock issuances subject to the veto power of the PSC is too great a deterrent against an interstate investment transaction involving a WUHCA-governed holding company. N.R. 078 ¶¶ 16-17.

The interstate utility market has determined that the most efficient way to ensure delivery of reliable electric services in the United States is through consolidation, which will be

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[8] The impact of the challenged WUHCA statutes on interstate commerce is demonstrated by the findings of a survey of the companies involved in one-third of the M&A transactions involving investor-owned corporations in the utility industry between June 1, 1999 and July 31, 2000. N.R. 081 at ¶¶ 17-21, Exh. B. All the survey responses confirmed that the companies would not invest in a controlling interest in a holding company governed by the Asset Cap and the PSC Securities Regulation Statutes. Eighty-six percent (86%) confirmed that the Takeover Statute would have led them to reject a transaction with a holding company governed by such law. N.R. 081 at ¶¶ 17-21, Exh. B. Of the 35 M&A transactions among utilities, both electric and gas, in the United States during the period 1998-2000, none involved interstate transactions with Wisconsin utilities or utility holding companies. N.R. 078 at ¶ 19.

restrained by extraterritorial regulation like the challenged WUHCA statutes. Given the current controversy and debate over power generation, transmission and reliability, if the Seventh Circuit's decision stands, other state legislatures can pass similar laws to restrict the interstate activities of utility holding companies in an attempt to further each state's parochial interest. For instance, AEC has utility investments not only in Wisconsin but also in Iowa, Illinois and Minnesota. If Wisconsin can prohibit a non-Wisconsin corporation from issuing stock to raise capital for non-Wisconsin investments unless its non-utility investments fall within one or more categories approved by Wisconsin, then Iowa, Illinois and Minnesota can do the same but each can create entirely different categories. *See* PSC Securities Regulation Statutes. As a result, an Indiana corporation could not issue stock to raise capital for an Indiana investment without the approval of the PSC, the Iowa Utilities Board, the Illinois Commerce Commission and the Minnesota Public Utilities Commission. Any one of the four Commissions could veto the stock sale entirely or allow issuance of stock in different amounts and for different purposes. The *per se* ban on extraterritorial state regulation exists to prevent just such inconsistent, extraterritorial restraints on interstate commerce by multiple state regulatory schemes. *See Brown-Forman,* 476 at 582 ("Forcing a merchant to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce."); *Healy,* 491 U.S. at 336.

Nor is the impact of the Seventh Circuit's ruling confined to the utility industry. Under the Seventh Circuit's holding, the impact on interstate commerce by a state's regulation of commerce entirely outside its borders may now be balanced against the interests the state is trying to protect. Depending on which way the scales tip in the reasoning of a particular

court, a state may be allowed to regulate extraterritorial transactions by non-state entities to protect consumers, or the environment, or health care patients or for other purely parochial interests. States rarely have the same local interests and inconsistent, conflicting regulation would almost be a certainty. This Court should grant AEC's Petition to dispel any confusion or misunderstanding about the one constant that can be found in Commerce Clause scrutiny: no matter how important the interest sought to be protected, a state may not regulate transactions by non-state entities that occur wholly outside its borders. That regulation of interstate commerce is reserved for Congress alone.

CONCLUSION

For the foregoing reasons, Alliant Energy Corporation respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-2618

[Filed July 14, 2003]

ALLIANT ENERGY CORPORATION and WISCONSIN POWER AND LIGHT COMPANY, Plaintiffs-Appellants,	)
v.	)
AVE. M. BIE, BURNEATTA BRIDGE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission, Defendants-Appellees.	)

Appeal from the United States District Court
for the Western District of Wisconsin
No. 00 C 0611
John C. Shabaz, Judge

Before FLAUM, Chief Judge, and COFFEY and WILLIAMS, Circuit Judges.

OPINION

ON PETITION FOR REHEARING EN BANC

FLAUM, *Chief Judge.*

On June 12, 2003, plaintiffs-appellants, Alliant Energy Corporation and Wisconsin Power and Light Company, filed a petition for rehearing *en banc*. No judge in active service has requested a vote thereon and the petition is denied.

Nonetheless, the petition raises arguments not fully developed in appellants' original briefs,[1] and while these arguments do not change the outcome of this case they do warrant some further comment. Appellants' primary argument is that the panel's opinion does not address prior case law of this circuit and of the Supreme Court. Appellants claim that such precedent mandates the *per se* invalidation of *every* state regulation that has any extraterritorial effect whatsoever. This principle is not established by the cases they cite and is contradicted by other authority.

Before addressing the specifics, it will be useful to restate the general principle set forth in our initial opinion. Under interstate commerce analysis we apply a two-tiered test. If the statute in question facially or directly discriminates against or regulates interstate commerce, it is "virtually *per se*" invalid--such a statute can only be saved by passing the strictest of

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[1] In this context we urge future litigants to present fully and clearly in their original briefs all arguments they wish the court to consider. This advice is especially pertinent when a party is asking the court to take the momentous step of invalidating as unconstitutional duly enacted legislation.

scrutiny. On the other hand if the statute's effects on interstate commerce are only incidental or indirect and apply evenhandedly, we apply the balancing test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). This is a somewhat general overview and we noted in our original opinion that there is no clear line separating the statute's that will be *per se* invalid and those that will be subject to the *Pike* balancing test. *Alliant Energy Corp. v. Bie*, 330 F.3d 904, slip op. at 10 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986)). We also noted that under either tier of the test "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

But what about extraterritorial regulation? Appellants suggest that a different standard should be applied. They suggest that regardless of the beneficial effects a statute has on local activity it should be declared invalid if it has *any* extraterritorial effects. Thus, what we have called "the critical consideration" for our general interstate commerce inquiry is, in the view of the appellants, irrelevant here. This position is not sustainable. It is not clear why the inquiry would be any different. Appellants have sought to invalidate the statute as violating the *interstate commerce clause*, and have failed to explain, other than citation to the supposedly supporting authority, why we shouldn't apply the traditional approach applied to all claims under the *interstate commerce clause*. And contrary to appellants' contentions the cases cited stand only for the unsurprising principle that a *direct or facial* regulation of wholly extraterritorial transactions is *per se* invalid, which is an unremarkable application of the traditional two-tiered approach.

Of course, the corollary to the principle that direct or facial regulation of wholly extraterritorial transactions is *per se* invalid under the two-tiered approach is the principle that incidental or indirect effects on extraterritorial transactions are subject to the *Pike* balancing test. This approach follows as extraterritorial regulation presents the same threats as regulation of interstate commerce, and there is no logical reason to treat the two differently. It is hard to explain why the validity of regulation of transactions between two states would turn on the identity of those two states.[2]

As we explained in our prior opinion, the regulations in question here have indirect and evenhanded incidental effects on interstate commerce and extraterritorial transactions. We therefore applied the *Pike* test and found the regulations to be justified.

Appellants question this reasoning. They argue that we erred in not applying the reasoning of Justice White's opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982). That reasoning, they argue, suggests that all extraterritorial regulation should be declared *per se* invalid. We noted that part V-A of Justice White's opinion, the part relied upon by appellants, did not garner support from a majority of the Court, whereas part V-B, applying the *Pike* balancing test, did. Appellants now contend that the reasoning of part V-A has been adopted by the Supreme Court in *Brown-Forman Distillers*, and this court in *Dean Foods*

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[2] Obviously, it will likely be harder in most cases for a state to come up with a local justification for statutes with extraterritorial effects, but that fact is accounted for in the two-tiered approach and the balancing test.

Co. v. Brancel, 187 F.3d 609 (7th Cir. 1999). Appellants note that *Brown-Forman Distillers* cites approvingly to part V-A of *Edgar v. MITE*. While this is true, the citation is for the proposition that direct regulation of interstate commerce is virtually *per se* unconstitutional. *Brown-Forman Distillers*, 476 U.S. at 579 and 582. But that much is well established and not at issue here. In fact, the citation in *Brown-Forman* implies that as the *Brown-Forman* court viewed Justice White's opinion in *MITE*, Justice White was saying that the statute in question was a *per-se*-invalid direct regulation under the traditional two-tier test (part V-A), and alternatively it was an indirect regulation that failed the *Pike* test (part V-B).The first proposition gained the support of a plurality, the second received the support of a majority. Thus, a majority of justices agreed that the two-tiered test was the appropriate approach, however they didn't agree on how the case before them fit that test. Read in this light, the opinion suggests that extraterritorial regulations are subject to the traditional interstate commerce analysis, which is the exact approach we followed in our opinion-- we only reached a different result because the facts of our case are clearly distinguishable. Of course, appellants are not arguing that Justice White was saying that at all; they interpret his opinion as saying that in all cases extraterritorial effects will invalidate a statute regardless of the local benefit. Inasmuch as this interpretation was the view of the plurality in *MITE*, that view has not been adopted by subsequent decisions and is not controlling. *Cf. CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 81, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987) (noting, in the context of a different section of the plurality opinion in *MITE*, that "as the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning") (footnote omitted). We rejected that view in our original

opinion, adhering instead to the majority's application of the *Pike* balancing test, and we reiterate that rejection here.

Appellants further advance that our opinion directly contradicts the opinion from this court in *Dean Foods*, 187 F.3d 609. The language appellants cite from that opinion is neither controlling nor contradictory. First, the cited passage is dicta and so, even assuming *arguendo* that the language in *Dean Foods* suggests tension with our opinion, it is not controlling. The parties in that case conceded that if the statute regulated extraterritorially it was invalid. *Id.* at 613. The panel's opinion held them to this concession, noting that the only issue before it was the factual question of whether the statute regulated extraterritorially. *Id.* at 616. Relatedly but more importantly, in our discussion in *Dean Foods* we never decided the issue. Recognizing that there was a significant legal issue involved, the panel discussed the contours of the question of whether extraterritorial regulations were *per se* invalid. We discussed the *MITE* plurality and the language appellants want us to adopt, but immediately followed that with a discussion of the contrary Supreme Court holding in *CTS*. *Dean Foods*, 187 F.3d at 615. We then noted and discussed cases supporting the notion that direct and facial regulation of extraterritorial transactions is absolutely banned. But in the end we explained that the issue need not be decided. *Id.* at 616.

Finally, the *Dean Foods* case is distinguishable from our case, and the reach of the language should be confined to the type of facts in that case. The Wisconsin statute at issue there was being applied to dictate the price of milk sold in Illinois. Thus, we were dealing with a *direct* regulation of extraterritorial commerce. The fact that *Dean Foods* uses

general language and does not address the distinctions of the two-tiered test is not surprising since the issue was not in contention and the statute before the court was a direct and therefore *per se* invalid regulation. As we have stated there is no question that such a regulation is *per se* invalid, but this tells us nothing about indirect effects on extraterritorial commerce--and since *Dean Foods* was not faced with that question, it is inappropriate to apply its analysis to this case.

Appellants also cite *Healy v. Beer Institute*, 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989), and *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995), as being contradictory to our position. Once again these are cases distinguishable on their facts because they deal with *direct* extraterritorial interference. In *Myers* the statute attempted to dictate the waste management and recycling standards in other states. 63 F.3d at 658. We applied the two-tiered approach and found that the statute was a direct regulation of interstate commerce and therefore *per se* invalid. *Id. at 657-61*. Likewise, *Healy* deals with direct extraterritorial price regulation, which unquestionably is *per se* invalid. *Healy*, 491 U.S. at 335-40. Additionally, *Healy* also dealt with facial discrimination against out-of-state products. *Id.* at 340.

It would be a mistake to import the language from those cases when *CTS* is more clearly on point. *CTS* says that when a state regulates internal matters and the regulations have external effects, the regulations are not *per se* invalid. *CTS* dealt with an Indiana statute that regulated the acquisition of control shares in Indiana corporations owned in part by a significant number of Indiana residents. The statute had the possible effect of regulating transactions in which non-Indiana

purchasers sought to acquire shares from non-Indiana shareholders. The Court nonetheless rejected the notion of *per se* invalidity:

> Dynamics argues in any event that the State has " 'no legitimate interest in protecting the nonresident shareholders.' " Dynamics relies heavily on the statement by the *MITE* Court that "insofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." But that comment was made in reference to an Illinois Law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders of *nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE,* the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

481 U.S. at 93 (citations omitted). The first thing that is obvious from this excerpt is that the Court did not find the regulation *per se* invalid just because it burdened out-of-state transactions. Instead, the Court discussed the interests served

by the regulations in question. Second, the Court ruled that a major factor in balancing interests is the fact that the regulation serves to protect a vital interest of local residents, and that it does so in every application. The same is true here. To use the similar phrasing of that case: Every application of the Wisconsin Act will affect a substantial number of Wisconsin residents [ratepayers], whom Wisconsin indisputably has an interest in protecting. The key factor is that *CTS* and the instant case are distinguishable from *MITE* because the regulations in *MITE* in some instances regulated extraterritorial transactions for no reason while providing no protection for any legitimate state interest, whereas the statutes in *CTS* and here never affect extraterritorial transactions without providing a corresponding and significant protection for a legitimate interest of local residents. *See also Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989) (applying the reasoning of *CTS* to uphold a statute that regulated tender offers of locally incorporated businesses). The reasoning of *CTS* is applicable to the case before us and rebuts appellants' claims that our opinion is foreclosed by the cases they have cited.

For the reasons set forth in this order and in the original panel opinion, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-2618

[December 4, 2002, Argued
May 29, 2003, Decided]

ALLIANT ENERGY CORPORATION and WISCONSIN POWER AND LIGHT COMPANY,
Plaintiffs-Appellants,

v.

AVE M. BIE, BURNEATTA BRIDGE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 00 C 0611
John C. Shabaz, Judge

JUDGES: Before FLAUM, Chief Judge, and COFFEY and WILLIAMS, Circuit Judges.

OPINION

FLAUM, *Chief Judge*. This case involves various statutes regulating public utilities and public utility holding companies in Wisconsin. The plaintiffs challenge the constitutionality of the statutes under the *Commerce* and *Equal Protection clauses of the United States Constitution*. The district court granted summary judgment in favor of the defendants. The plaintiffs appeal. For the reasons stated herein, we affirm in part and reverse in part.

I. Background

i. The Parties

The plaintiffs in this case are Alliant Energy Corporation ("Alliant") and its subsidiary, Wisconsin Power and Light Company ("WPLC").[1] Alliant is incorporated in Wisconsin and functions as a Wisconsin public utility holding company. Under WIS. STAT. § 196.795 (1)(h)(1)(a) that means that Alliant owns or controls more than 5% -- in this case 100% -- of the outstanding voting securities in a Wisconsin public utility, namely WPLC, a Wisconsin corporation that provides utility services in Wisconsin. Alliant has two other subsidiaries: Interstate Power and Light Company, which provides utility services in Iowa, Minnesota and Illinois; and Alliant Energy Resources, Inc., which owns Alliant's non-utility holdings. Alliant is subject to regulation by the Minnesota Public Utilities Commission, the Iowa Utilities Board, the Illinois Commerce Commission, the Securities and Exchange Commission, and most relevantly the Wisconsin

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[1] For convenience, we will generally refer to the arguments as belonging to Alliant.

Public Service Commission ("PSC"). WPLC is also regulated by the PSC.

This is a suit against the PSC (the named defendants in this case, Ave Bie, Burneatta Bridge and Robert M. Garvin, are sued in their official capacities as commissioners of the PSC).

ii. The Statutory Provisions

There are numerous provisions of Wisconsin law that are challenged in this appeal, and two other provisions that, though unchallenged, are relevant to our analysis. The relevant unchallenged provisions are as follows:

> **Ch. 180:**[2] This chapter provides the rules for incorporation within Wisconsin. Both Alliant and WPLC are incorporated under ch. 180. Alliant is seeking to reincorporate in another state.
>
> **§ 196.795(2):** This is the section specifically providing for and authorizing the formation of utility holding companies. It is by virtue of this provision that Alliant is authorized to exercise ownership and control over WPLC; to put it another way, without this provision Alliant would not exist at all as a holding company.

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[2] All of the laws listed are Wisconsin statutes and so we list only chapter or section number.

The challenged provisions are as follows:

§ 196.53: "No license, permit or franchise to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power may be granted or transferred to a foreign corporation [with some exceptions]."

§ 196.795(5)(L) ("in-state incorporation provision"): This provision requires that a public utility holding company be incorporated in Wisconsin, under WIS. STAT. CH. 180.

§ 196.795(3) ("the takeover provision"): This provision requires PSC approval before a person can acquire more than 10% of the outstanding voting securities of a public utility holding company.

§ 196.795(6m)(b) ("the asset cap"): This provision limits the extent to which a public utility holding company may invest in non-utility businesses.

§§ 196.795(5)(a) and (7)(a), 201.01(2), and 201.03(1) ("the securities regulation provisions"): These provisions provide that PSC may regulate the issuance of securities by "public service corporations." The provisions also define the application of the term "public service corporations."[3]

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[3] The definition is broad enough that the PSC might deem Alliant to be a "public service corporation."

The in-state incorporation provision, the takeover provision, the asset cap, and the securities regulation provisions are all part of the *Wisconsin Utilities Holding Company Act* (WUHCA).

iii. The Challenge

Alliant and WPLC challenge the constitutionality of the in-state incorporation provision, the takeover provision, the asset cap, and the securities regulation provisions as well as § 196.53. Alliant argues that these provisions violate the *Commerce* and *Equal Protection clauses of the United States Constitution*.[4] The district court found that the provisions are not unconstitutional and alternatively that Alliant is estopped from challenging the provisions in the first place. Accordingly, the district court granted summary judgment in favor of the defendants.

II. Discussion

Alliant presents its arguments generally as to all challenged provisions with few distinctions between them. The issues of this case cannot be meaningfully analyzed in such a manner. The provisions of the statute have very

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[4] The district court originally dismissed the case for lack of standing. In a prior appeal we reversed, holding that if Alliant can show that they intended to make investment purchases and sales in violation of the provisions and to reincorporate outside of Wisconsin, they could establish standing to challenge the provisions. *Alliant Energy Corp. v. Bie*, 277 F.3d 916 (7th Cir. 2002). Alliant has done this and therefore standing is no longer an issue.

different purposes and effects. We therefore deal with the provisions in three distinct categories: the first category is simply the in-state incorporation provision requiring that a holding company be incorporated under Wisconsin law; the second category is § 196.53, the provision requiring that licenses, permits and franchises for local utilities not be granted or transferred to foreign corporations; and the third category is made up of the remaining provisions, which regulate the financial structure and activities of the holding company (hereinafter "the structural provisions").

a. Constitutional Estoppel and Severability

The district court found that Alliant was estopped from challenging the constitutionality of the Wisconsin statutes. The district court reasoned that because Alliant is authorized to exist as a holding company by virtue of WUHCA, in provision § 196.795(2), it cannot then challenge the constitutionality of other parts of the act. The district court based its holding on *Fahey v. Mallonee*, 332 U.S. 245, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947). The Supreme Court in *Fahey* explained, "It is an elementary rule of constitutional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *Id.* at 255 (quotations and citations omitted). As elementary as the rule may have been, the "doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach." *Arnett v. Kennedy*, 416 U.S. 134, 153, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974); *accord Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir.1983). We therefore view the rule as one to be applied on a case-by-case basis. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 456-57, 101 L. Ed. 2d 399, 108 S. Ct. 2481

(1988) ("We doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it."). It is also important to recognize the close tie between the rule of estoppel and the question of severability of statutory provisions. The question of severability was essential to the decision in *Fahey*:

> In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets it may perpetually go on, notwithstanding any abuses which its management may perpetuate.

Fahey, 332 U.S. at 255-56. As the challenged provision was "hardly severable" from the provision that allowed the plaintiffs in that case to exist, it made sense to estop them from making the challenge. If the plaintiffs were allowed to challenge a non-severable provision, the result would be strange indeed -- a victorious plaintiff would have litigated itself out of existence.

The defendants argue that the challenged provisions, as part of WUHCA, are not severable from the other provisions of that act, especially WIS. STAT. § 196.795(2), the provision under which Alliant is authorized to exist as a

holding company. In making this argument the plaintiffs must overcome the presumption in Wisconsin of severability of statutory provisions. Wisconsin Statute § 990.001(11) provides,

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

This presumption can only be overcome by showing that the legislature, intending the statute to be effective only as an entirety, would not have enacted the valid part of the statute by itself. *State v. Hezzie R.*, 219 Wis. 2d 848, 863-66, 580 N.W.2d 660 (1998).

The merit of the defendants' argument that the provisions are not severable from § 196.795(2) is different for each of the three categories of challenged provisions. For the group we refer to as the structural provisions the defendants have a strong argument. These provisions were part of a larger legislative compromise. Wisconsin clearly has an interest in policing its public utilities to protect the welfare of ratepayers. The existence of a holding company creates the opportunity and incentive for deceptive practices such as cross-subsidization from the regulated public utility to a non-regulated subsidiary. It is not surprising that when Wisconsin finally decided to authorize the existence of public utility holding companies they accompanied that authorization with statutory provisions allowing for government control of the

financial structure and activities of such companies. It is not at all clear that Wisconsin would have authorized the formation of public utility holding companies had it not been for these protective controls. It therefore appears improper to sever the structural provisions from § 196.795(2).

The fact that the structural provisions are probably not severable from § 196.795(2) suggests that the reasoning of *Fahey* would apply to estop Alliant here. On the other hand, Alliant argues that if a holding company is not allowed to challenge the provisions then they might go unchallenged because prospective entrants to the holding company market would have difficulty establishing standing to sue. Though we question whether Alliant's standing argument is persuasive, we need not resolve the issue today, because, as discussed below, we conclude that even if Alliant can challenge the structural provisions the challenge must fail.

As to the in-state incorporation provision, we conclude that Alliant is not estopped. Again we begin with the presumption of severability. The defendants have provided no rationale for why this provision should be inextricably tied to § 196.795(2). In fact, as will be shown later, the defendants cannot provide any rationale for the existence of this statute. As the provision serves no valid legislative purpose, it is difficult to see why Wisconsin would have made its inclusion an integral condition in the legislative compromise to allow public utility holding companies. The defendants have shown no evidence that Wisconsin would not have authorized the formation of public utility holding companies in the absence of the instate incorporation provision, nor have they provided any logical explanation for why a State would want to

condition the authorization of public holding companies on an in-state incorporation requirement.

As far as we can tell, and as far as the defendants' argument leads us, the provision was tacked on as an insurance measure in case the structural provisions could not stand on their own. Since those provisions can stand on their own, the insurance measure is unnecessary. The result would be quite ironic if defendants were right and the in-state incorporation provision was nonseverable: the non-severable provision, inserted to protect the constitutionality of the statute, would threaten the constitutionality of the entire statute, which otherwise has no constitutional failings at all. We therefore hold the in-state incorporation provision to be severable from the rest of the statutory provisions. That being the case, Alliant is not estopped from pursuing its challenge to the constitutionality of the provision.

Finally, as to § 196.53, the defendants do not argue that Alliant, or WPLC, is estopped from challenging this provision. There is little or no connection between that provision and the authorization of public utility holding companies. § 196.53 prohibits the granting or transferring of a public utility license, permit or franchise to a foreign corporation. This deals with the actual provision of the utility and not the financial structure of the utility holding company. Alliant is not estopped from challenging § 196.53.

b. Commerce Clause Analysis

While the Commerce Clause, U.S. CONST. art. I § 8, cl. 3, explicitly grants Congress the authority to regulate commerce among the States, it has long been understood that

it also directly limits the power of the States to discriminate against or burden interstate commerce. *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1276 (7th Cir. 1992); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 98, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994). This "negative" aspect of the *Commerce Clause* is often referred to as the "Dormant *Commerce Clause*" and is invoked to invalidate overreaching provisions of state regulation of commerce. If a party seeking to invalidate a statute cannot show any burden on interstate commerce, then the Dormant *Commerce Clause* is not implicated and the statute will not be invalidated. For those cases where interstate commerce is burdened, the Supreme Court has adopted "what amounts to a two-tiered approach" to determining the validity of the statute. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986). The first tier is often referred to as the "virtual *per se*" rule. This rule is applied when a statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Id.* at 579. In such cases the Court has "generally struck down the statute without further inquiry." *Id.* The only thing that can save a statute under this analysis is a showing by the State that the law "advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *Oregon Waste Sys.*, 511 U.S. at 100-01 (internal quotations and citations omitted). But this showing must "pass the strictest scrutiny" and "the State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." *Id.* (internal quotations and citations omitted).

The second tier is for cases where a statute "has only indirect or incidental effects on interstate commerce and regulates evenhandedly"; in such cases "the statute will be upheld 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Gov't Suppliers*, 975 F.2d at 1277 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)). This test has become known as the *Pike* balancing test. In determining which tier to apply, the rule of thumb is that essentially any statute that facially discriminates against out-of-state commerce will fall subject to the *per se* rule, and all other statutes that have an effect on interstate commerce will be analyzed under the *Pike* balancing test. Nonetheless, the Court has "recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the *Commerce Clause*, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers*, 476 U.S. at 579. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

With this framework in mind we turn now to the three categories of statutory provisions challenged by Alliant.

i. In-State Incorporation of Holding Company

It is important to understand that the requirement that the holding company be incorporated in-state must be analyzed separately and distinctly from the § 196.53 requirement that a licence, permit or franchise to operate as a utility company only be granted or transferred to a Wisconsin corporation. The source of this distinction is the difference in kind between the commerce being regulated by each provision. The

provision of public utilities within Wisconsin is intrastate commerce.[5] An investment opportunity in a Wisconsin utility is, on the other hand, an article of interstate commerce. *Cf. Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 64 L. Ed. 2d 702, 100 S. Ct. 2009 (1980). If ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of interstate commerce, i.e., the investment in the utility, is stopped at the border. Section 196.53 simply says that if you are going to produce an article of commerce within Wisconsin and sell it within Wisconsin then Wisconsin has the right to regulate your activities, whereas the in-state incorporation provision says that an article of commerce produced in Wisconsin is prohibited from being sold anywhere other than Wisconsin. This is a fundamental distinction. *See Eli Lilly & Co. v. Sav-On-Drugs Inc*, 366 U.S. 276, 6 L. Ed. 2d 288, 81 S. Ct. 1316 (1961).

Not only is it clear that the in-state incorporation provision regulates interstate commerce, but that the burdens produced by that regulation could be substantial. The requirement that

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[5] Of course, if a utility were provided to Wisconsin users from an out-of-state source -- by this we mean that the generation facilities are located out-of-state, not the corporate entity -- that would be interstate commerce. *See Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985). Likewise, if a facility located in Wisconsin were providing a utility to users in other States, that too would be interstate commerce. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 71 L. Ed. 2d 188, 102 S. Ct. 1096 (1982). Such provision of utilities is controlled by federal regulation and presumably exempted by the terms of § 196.53; and in any event such scenarios are beyond the scope of this appeal.

a holding company be incorporated in Wisconsin requires that ultimate ownership lie in a Wisconsin corporation. To comply with this requirement a corporation could not just create a subsidiary; instead it would have to reincorporate the parent corporation in Wisconsin. If every State adopted this rule there would be no interstate investment in public utilities at all. No holding company parent could own public utility companies in more than one State. Section 196.53 in contrast does not create this balkanization between the States because a foreign company that wants to get involved in Wisconsin utility provision need only create a subsidiary and incorporate it in Wisconsin.

Determining that the Wisconsin provision burdens interstate commerce is only the beginning of the analysis. We must then apply either the rule of virtual *per se* invalidity or the *Pike* balancing test. The parties disagree about which tier of analysis should be applied to this provision. We think that the provision falls under the *per se* rule, but it is not necessary for us to make this determination as the provision is clearly invalid under the *Pike* test. *See Lewis*, 447 U.S. at 42 (not deciding whether legislation is *per se* invalid when the Court was convinced that the legislation was invalid under the balancing test); *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 891, 100 L. Ed. 2d 896, 108 S. Ct. 2218 (1988) (choosing to conduct a *Pike* balancing even where the statute "might have been held to be a discrimination that invalidates without extended inquiry").

The Supreme Court applied the *Pike* balancing test to invalidate a nearly identical statute in *Lewis*. The only difference in that case was the type of holding company. There the statute prohibited out-of-state holding companies

from owning companies in Florida that sold investment advisory services; here the statute prohibits out-of-state holding companies from owning companies in Wisconsin that provide public utilities. The defendants argue that this distinction is dispositive. They essentially argue that the importance of local regulation of public utilities creates an exemption from normal *Commerce Clause* analysis. We do not question the importance of regulating public utilities and surely we should take the importance of public utilities into account in balancing the burdens on interstate commerce against the local benefits of the regulation; nonetheless, the importance of such regulation does not trump *Commerce Clause* analysis. In *Lewis* the Supreme Court noted the importance of local regulation of investment practices: "Financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis*, 447 U.S. at 38. Still the Court conducted a full *Commerce Clause* inquiry. The Court explained that just because local regulation is important "it does not follow that these same activities lack important interstate attributes." *Id.* Important regulations that burden interstate activities are just as subject to *Commerce Clause* analysis as any other regulations.

As we apply the *Pike* balancing test, we note that the defendants have given us no legitimate local benefits to balance against the burden on interstate commerce. While they have told us that regulating public utilities is important, they have failed to provide any argument to show that the in-state incorporation provision contributes to any meaningful regulatory scheme. The only rationale the defendants provide to save the in-state incorporation provision is the argument that in-state incorporation is necessary to save the constitutionality of the structural provisions. The defendants

want us to assume that the structural provisions, standing alone, are unconstitutional. Of course, they attempt to refute this same proposition later when arguing for the constitutionality of the structural provisions themselves; but for the meantime they want us to accept the assumption. If the structural provisions are unconstitutional, the defendants argue, it is only because without in-state incorporation they affect the structure and financial activities of out-of-state holding companies. Recognizing this assumed constitutional weakness, Wisconsin has circumvented the problem by requiring that all holding companies be incorporated in Wisconsin. The in-state incorporation requirement, the argument goes, although otherwise unconstitutional is therefore saved by the fact that it is itself necessary to save the structural provisions, thus promoting regulation of the financial activities and structure of local utilities. One unconstitutional provision combines with another unconstitutional provision to create a constitutionally valid scheme. We have serious reservations as to the merits of this sort of constitutional bootstrapping. But the structural provisions, as we discuss below, are fully valid. And beyond the above argument of the defendants, they have provided no alternative rationale for us to consider. Given the validity of the structural provisions, the stated purpose of the in-state incorporation provision is moot: there is no need for an otherwise unconstitutional provision to save the constitutionality of an otherwise constitutional provision. This makes any balancing under *Pike* fairly effortless: no legitimate local interest has been presented to justify the burden the in-state incorporation provision has on interstate commerce.

The fact that Wisconsin could have prohibited the existence of any holding company outright does not change the outcome. A State may prohibit the local production of certain commerce, but as soon as such commerce is produced the State may not prevent it from crossing state lines. The landfill cases provide an example. States may choose not to zone land for dumping, but once the land is opened up for trash it must be opened up for all refuse, no matter where it originates. *See, e.g.*, *Oregon Waste Sys.*, 511 U.S. 93, 128 L. Ed. 2d 13, 114 S. Ct. 1345; *City of Philadelphia v. New Jersey*,437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978). The same is true of all items of commerce, including investment opportunities such as ownership in a public utility company.

ii. Section 196.53

Alliant, through its subsidiary WPLC, challenges WIS. STAT. § 196.53, which provides, in relevant part, as follows:

> No license, permit or franchise to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power may be granted or transferred to a foreign corporation.

It is not exactly clear what Alliant is challenging with respect to this provision. A cite to the statutory provision doesn't even show up in their opening brief's list of authorities, although it miraculously appears as one of the most cited provisions in their reply brief. Alliant's argument seems to be that whatever logic applies to the in-state incorporation

provision must also apply to § 196.53. That cannot be the case. The in-state incorporation provision, requiring that a holding company be incorporated in Wisconsin, deals with *inter*state financial transactions whereas § 196.53 deals with *intra*state provision of public utilities -- this distinction was discussed more extensively above. Other than this piggybacking of arguments, we glean from the briefs and the record that Alliant claims that § 196.53, in prohibiting the "transfer" of licenses, permits or franchises to foreign corporations, precludes WPLC from selling any of its utility assets to a foreign corporation. This result occurs because the assets are useless without the license, permit or franchise to operate a public utility within Wisconsin. Alliant is not challenging the statutes prohibition on "granting" the licenses, permits or franchises to a foreign corporation.[6] Nonetheless, a holding that invalidates the prohibition on "transferring" would render the prohibition on "granting" practically meaningless -- a foreign corporation seeking to provide public utilities within Wisconsin could simply enlist a Wisconsin corporation to transfer to it the permit, license or franchise to provide the utility. Wisconsin's purpose of keeping public utilities incorporated in-state would be unprotected and the only thing keeping foreign corporations from providing the utility would be a relatively small transaction. As such we must view Alliant's challenge to § 196.53 as one to the entire provision -- a challenge that asks us to invalidate Wisconsin's prohibition both on granting and on transferring licenses, permits or franchises for Wisconsin public utilities to foreign corporations.

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[6] They would likely lack standing to directly challenge that aspect of § 196.53.

The position is a dramatic one that would alter significantly the present law of utility regulation. For similar and long-standing statutes *see* N.H. REV. STAT. ANN. § 374:24 and OHIO REV. CODE ANN. § 4905.62. One would have expected a more comprehensive argument when a party is asking a court to so conclude. We are unpersuaded by Alliant's challenge. The provision of public utilities that are generated, distributed, and consumed in Wisconsin is an inherently local and intrastate business.[7] It is well-established that a State is free to regulate commerce that is intrastate in nature. *See Eli Lilly*, 366 U.S. 276, 6 L. Ed. 2d 288, 81 S. Ct. 1316; *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211, 88 L. Ed. 1227, 64 S. Ct. 967 (1944); *Ry. Express Agency, Inc. v. Virginia*, 282 U.S. 440, 75 L. Ed. 450, 51 S. Ct. 201 (1931); *Kansas City Structural Steel Co. v. Arkansas*, 269 U.S. 148, 70 L. Ed. 204, 46 S. Ct. 59 (1925). Furthermore, the fact that an entity is involved both in intra- and interstate commerce does not exempt that entity from compliance with the intrastate regulations. *Eli Lilly*, 366 U.S. at 279 ("Lilly could not escape state regulation merely because it is also engaged in interstate commerce."). Thus, even if WPLC provided electricity both intrastate to Wisconsin users and interstate to foreign users, this would not

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[7] If Alliant is instead resting their challenge on the notion that § 196.53 is unconstitutional because it prohibits foreign corporations from using WPLC's assets for *inter*state generation and transmission of power -- generating the power in Wisconsin and shipping it out, or using WPLC's distribution lines to bring in power generated outside of Wisconsin -- they have not presented this argument in their briefs. And it is not clear that the statute even has such an affect, or that Alliant would have standing to bring that challenge.

constitutionally exempt it from local regulation of its intrastate operations.

The Supreme Court has left unanswered the question of whether this approach allows a State to require local incorporation as a condition of doing business in local markets. *Lewis*, 447 U.S. at 50-51; *but see Railway Express*, 282 U.S. at 444 (State may require a foreign corporation to take out a local charter prior to being granted a permit to conduct local business). In addressing this question under the *Pike* balancing test we can assume, because Alliant has not argued otherwise, that a local incorporation requirement has a minimal burden on *inter*state commerce and serves a legitimate and important state interest in regulating *intra*state commerce. *Cf. Eli* Lilly,366 U.S. at 279 (legitimate state interest served by requirement of certificate of authority to do business as a prerequisite to participation in intrastate commerce); *Union Brokerage*, 322 U.S. at 211 (same). At best Alliant's implied argument, if there is one, boils down to a claim that by requiring local incorporation of intrastate business Wisconsin is burdening interstate commerce in the assets of intrastate business. Such a position is not sustainable. If a piece of equipment is only useful in providing a utility in Wisconsin, the sale of the equipment is not an interstate transaction, even if the buyer is a foreign corporation. If WPLC sells a power plant located in and immoveable from Wisconsin to any buyer, that is an intrastate transaction. No item of commerce crosses state-lines. The sale of a piece of moveable equipment that might be useful outside of Wisconsin is of course interstate commerce; but Alliant has not argued that such a sale is affected by § 196.53. Ultimately, Alliant has shown no excessive burden on interstate commerce and explained no reason why a State

cannot require local incorporation as a condition of doing local business in local markets. Based on these sparse arguments we cannot conclude that § 196.53 violates the Constitution.

iii. Structural Provisions

The remaining provisions (the takeover provision, the asset cap, and the securities regulations provisions) regulate the financial structure and activities of a holding company that owns a Wisconsin utility. None of these provisions discriminates on its face against out-of-state economic interests. All three treat in-state activity equally with out-of-state activity: the asset cap limits a utility holding company's ownership of non-utility assets regardless of where those assets are located; the takeover provision requires PSC approval prior to the sale of more than 10% of the holding company's stock no matter where the involved parties are located or incorporated; and the securities regulation provisions likewise require approval of the PSC prior to issuance of securities by a public service corporation without regard to whether the securities are entering into interstate commerce. None of the provisions imposes a burden on interstate commerce that they do not impose on intrastate commerce as well. But these provisions do all have effects on interstate commerce. In fact, given the invalidation of the in-state incorporation provision, some transactions regulated by these provisions may occur entirely outside of Wisconsin. For example, an Illinois corporation that owns a Wisconsin utility would be subject to Wisconsin regulation if it wished to sell 10% of its stock to an Indiana corporation or if it decided to diversify and purchase non-utility assets located in various States that amounted to greater than 25% of its worth. Such

transactions are no doubt interstate in nature. *See Edgar v. Mite Corp.*, 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982).

Provisions like these, that are facially neutral but indirectly burden interstate commerce, must be analyzed under the *Pike* balancing test. Alliant argues that no such balancing is necessary because the provisions burden extraterritorial commerce. We have no doubt that the provisions do in fact impact extraterritorial commerce (see our examples above); but we disagree with the proposition that this renders the provisions *per se* invalid. To support its argument Alliant directs our attention to the opinion of Justice White in *Edgar v. Mite*. In that case, where the majority of the Court struck down an Illinois statute requiring registration and approval of the Secretary of State of Illinois for any tender offer involving a corporation in which Illinois residents own 10% of the stock, Justice White wrote: "If Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." *Id.* at 642. Justice White went on to note: "The *Commerce Clause* also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 642-43. This language, if controlling, would mean victory for Alliant; the only problem is that the language, appearing in part V-A of Justice White's opinion, did not draw support from a majority of the Court and is therefore not the opinion of the Court.[8]

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[8] Justice White delivered a five part opinion, with Part V separated into V-A and V-B. The Justices split along many different

In part V-B, which did garner the support of a majority of the Court, Justice White applied the *Pike* test to the Illinois statute, and therefore we do the same for the Wisconsin provision in question here. *Id.* 643-46; *see also Southern Union Co. v. Missouri Pub. Serv. Comm'n, 289 F.3d 503 (8th Cir. 2002)* (rejecting the plaintiffs *per se* claim and applying the balancing test to provisions regulating the financial activities of public utilities). The burden on one side is, as we have stated, the effect the statute has on interstate financial transactions. This is no small impact. Certain interstate financial transactions of non-Wisconsin parties are subject to approval of the PSC while other such transactions are banned outright. This places a high, sometimes prohibitive, transactions cost on these dealings. *Cf. Mite*, 457 U.S. at 643 ("The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial."). The benefit on the other side is the regulation of local public utilities. This is an important interest. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983)("The regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); *accord Southern Union*, 289 F.3d at 509; *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1424 (4th Cir. 1985). This interest is served well by the structural provisions because they help to prevent such abuses as cross-subsidization and deceptive reporting of cost allocation. Cross-subsidization occurs when a firm uses the revenues from the sale of one product to subsidize the sale of a another

---

lines, and in the end only Parts I, II and V-B received support from a majority of the Court -- different majorities as to each part.

product. In a free-market system cross-subsidizing is not profit-maximizing and there are few incentives to do it. But regulation can distort free market incentives. The cost allocation and cross-subsidy problem can be illustrated by the following example. A firm sells products X and Y, where the market for X is regulated and the market for Y is unregulated. The regulation on X provides that a firm can charge a price that results in a fixed rate-of-return on its capital investment in X. Profits are dictated as a percentage of capital investment. The larger the investment in X, the greater profit the firm is authorized to collect. The price of Y is determined by free-market forces and not directly affected by the cost of capital investments. The firm has an incentive to allocate as much of its costs as possible as capital investments in the production of X. A less-than-honest firm may report certain costs attributable to product Y as investments in product X. Thus the consumers of product X cross-subsidize product Y by paying -- through the regulated rate-of-return pricing -- part of the costs in producing Y. The more products a firm is responsible for, the easier it is for the firm to misreport the allocation of its costs. This danger can be tempered by limiting the public utility holding company's involvement with and ownership of businesses and assets unrelated to providing the public utility. *See, e.g.*, *Southern Union*, 289 F.3d at 507-08 ("Rate regulation is a complex process. A public utility's investments in other companies can affect its regulated rate of return, if investment losses are allocated to the regulated business.").

In arguing that the balancing proves invalidity here, Alliant again points to *Edgar v. Mite* -- this time to part V-B where the majority invalidated the statute in question because Illinois had no interest in regulating the internal affairs of

foreign corporations and "insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S. at 644. This was true because the law affected the sale and purchase of stocks that might never involve any Illinois shareholders. The Court also noted that where the law did apply to transactions involving Illinois shareholders, the Court was "unconvinced that the Illinois Act substantially enhances the shareholders' positions." *Id.*

The V-B analysis in *Edgar v. Mite* can be distinguished from the instant case. Wisconsin has a strong interest -- namely the protection of the welfare of ratepayers -- to be weighed against the burden the statute places on interstate trade. The need to prevent abuses made possible by the presence of a holding company is extremely important and imperative for the proper functioning of any regulatory scheme. The dangers inherent in the mere existence of utility holding companies render a great need for structural regulation of those companies. A State is entitled to regulate the financial structure and investments of companies that control utilities in that State; otherwise it would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, however significant it may be, is not enough to outweigh this interest.

We are not alone in this assessment. The Eighth and Fourth Circuits have both found this interest to be of sufficient importance to outweigh the burden similar provisions placed on interstate commerce. The Eighth Circuit in *Southern Union*, applied the *Pike* test and upheld a law that required approval by the Missouri Public Service Commission

before any utility doing business in Missouri purchased stocks or bonds issued by another utility because the importance of regulating utilities and ratepayer welfare outweighed the burden placed on extraterritorial interstate stock transactions. *Southern Union*, 289 F.3d at 503. A similar analysis and outcome were reached in the Fourth Circuit in *Baltimore Gas & Electric* where the challenged statute prohibited nonpublic service corporations from acquiring more than 10% of a Maryland public utility, and required that even public service corporations seek approval before acquiring 10% of a Maryland public utility. 760 F.2d 1408. The court applied the *Pike* test and upheld the statute because of the importance of preventing deceptive practices inherently available to utility holding companies. *Id.* In conducting the balancing test the court recognized that "a necessary adjunct to ensuring the protection of consumers is the authority to regulate the corporate structure of public utilities" and that

> holding companies provide the occasion for deceptive financing practices, nondisclosure of important corporate accounts, and the manipulation of various "service charges" by the holding companies which increase the utility's costs and the ultimate charge to the consumer.

Id. at 1424-25.

Alliant also argues that these structural provisions are invalid because they are redundant of other regulations. These other regulations are laws that prohibit deceptive practices. This argument must fail. A State is serving a legitimate purpose when it passes structural regulations to serve as a

back up to prohibitions. The Fourth Circuit explained in *Baltimore Gas & Electric*:

> That the state has enacted a complex regulatory structure with overlapping provisions, more than one of which may serve ultimately to control suspect activity, does not vitiate the state's otherwise legitimate interest in curbing such suspect activity. The state may regulate the rates utilities charge consumers either directly, by requiring commission approval of rate increase, or indirectly, by controlling certain investments and attempts at diversification by the utility. That is, the state may choose one or more means to a particular end, and the legitimacy of the end -- the state interest served by the particular regulation -- is not vitiated when the state chooses several means of achieving that end.

760 F.2d at 1425.

We therefore conclude that the structural provisions in question pass the *Pike* test.

c. Equal Protection Analysis

The Equal Protection question is obviously moot for the in-state incorporation provision, which we have already found unconstitutional under the *Commerce Clause* analysis. As for the other provisions, the Equal Protection analysis would require a rational basis test. If Wisconsin can show that the provisions are rationally related to a legitimate state interest, then the provisions do not violate the *Equal Protection Clause*. In our *Commerce Clause* analysis, we have already

held that the provisions serve a legitimate state interest. Therefore the *Commerce Clause* analysis answers the Equal Protection question as well. The structural provisions and § 196.53 do not violate the *Equal Protection Clause*.

III. Conclusion

For the foregoing reasons we conclude that WIS. STAT. § 196.795(5)(L), the in-state incorporation provision, violates the *Commerce Clause of the Constitution*; that the arguments presented by Alliant regarding WIS. STAT. § 196.53, the provision prohibiting the transfers of licenses, permits and franchises to foreign corporations, do not establish that § *196.53*, as applied to WPLC, is unconstitutional; and finally that the remaining provisions -- § 196.795(3) (the takeover provision), § 196.795(6m)(b) (the asset cap), and §§ 196.795(5)(a) and (7)(a), 201.01(2), and 201.03(1) (the securities regulation provisions) -- do not violate the Constitution. Accordingly, we REVERSE the district court's grant of the defendants' motion for summary judgment and denial of the plaintiff's motion for summary judgment with regard to WIS. STAT. § 196.795(5)(L), and AFFIRM the district court's grant of the defendants' motion for summary judgment and denial of the plaintiff's motion for summary judgment with regard to all other challenged provisions and this case is REMANDED for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 00-C-611-S

[Filed May 20, 2002]

ALLIANT ENERGY CORPORATION and)
WISCONSIN POWER AND LIGHT COMPANY,)
Plaintiffs,)
)
v.)
)
AVIE M. BIE, JOSEPH P. METTNER, and)
JOHN H. FARROW,)
Defendants.)

MEMORANDUM AND ORDER

Plaintiffs Alliant Energy Corporation ("Alliant") and Wisconsin Power and Light Company ("WPL") commenced this declaratory judgment action against the commissioners of the Wisconsin Public Service Commission ("PSC") seeking a determination that certain Wisconsin statutes regulating utilities violate the Commerce and Equal Protection Clauses of the United States Constitution.

The case has previously been the subject of two decisions in this Court and one decision by the Court of Appeals

concerning whether there is a sufficient case or controversy to support subject matter jurisdiction. Subsequently, plaintiffs' have adopted certain corporate resolutions, authorizing and directing corporate officers to take actions which would violate the challenged statutes. As a result, doubts concerning the sufficiency of the controversy have been removed and the claims can be addressed on the merits. The matter now comes before the Court on cross motions for summary judgment on the constitutionality of the challenged statutes.

BACKGROUND

Plaintiff WPL is a Wisconsin public utility providing electric utility services to Wisconsin residents. It has been a regulated Wisconsin public utility since its Wisconsin incorporation in 1917. As a public utility WPL holds rights to certain local monopolies for the provision of utility services and is subject to substantial state regulation pursuant to Wisconsin statutes presently codified in chapter 196 of the Wisconsin Statutes. Among the numerous restrictions imposed on WPL throughout its status as a Wisconsin public utility is that it remain a Wisconsin corporation and not transfer its licenses, permits or franchises to own, operate or control local utility assets to a foreign corporation. Wis. Stat. § 196.53.

Prior to 1985 Wisconsin law did not permit the formation of holding companies for the ownership of public utilities. In 1985 Wisconsin adopted the Wisconsin Utility Holding Company Act (WUHCA), codified at 196.795, Wis. Stat., which authorizes the formation of utility holding companies only with the prior approval of the PSC and only subject to

numerous restrictions. For purposes of the WUHCA "holding company" is defined in part as:

> 1. "Holding company" means any of the following:
>
> a. Any company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities.

Among the restrictions imposed on holding companies by the WUHCA are the following:

> No person may take, hold or acquire, directly or indirectly, more than 10% of the outstanding voting securities of a holding company, with the unconditional power to vote those securities, unless the commission has determined, after investigation and an opportunity for hearing, that the taking, holding or acquiring is in the best interests of utility consumers, investors and the public....
>
> ....
>
> Any holding company which is incorporated shall be incorporated under ch. 180.
>
> ....
>
> 1. The sum of the assets of all nonutility affiliates in a holding company system of any holding company formed on or after November 28, 1985, may not exceed the sum of the following:

> a. Twenty-five percent of the assets of all public utility affiliates in the holding company system engaged in the generation, transmission or distribution of electric power.

Wisconsin Statutes § 201.03, relating to securities of certain public utilities, requires PSC approval and authorization for the issuance of securities by certain utility holding companies.

In 1981, Alliant (then named WPL Holdings, Inc.) was incorporated as a Wisconsin subsidiary of WPL. In 1987, with approval of the PSC in accordance with the WUHCA, the companies were reorganized so that Alliant became the sole shareholder of WPL and by definition a Wisconsin utility holding company. In 1998 various corporate transactions resulted in Alliant becoming the parent of two subsidiary foreign corporations which own utility companies providing services in Iowa, Minnesota and Illinois. In addition, Alliant is the parent of Alliant Energy Resources, a corporation which owns certain non-utility holdings including, among other things, transportation, real estate and railroad operations.

Alliant desires to reincorporate in Delaware, sell WPL assets to a foreign entity, sell more than 10% of its voting stock to a foreign investor and expand its non-utility holdings into assets beyond the statutory limitation on non-utility investment. The value of Alliant's stock is significantly less than it would be were the restrictions in the challenged provisions removed and Alliant's cost to raise capital by selling stock is higher than it would be were the restrictions removed. The cost of raising capital by borrowing is reduced

by the limitations on non-utility investments. The restrictions are a significant deterrent to a foreign corporation acquiring a controlling interest in Alliant.

MEMORANDUM

Plaintiffs' principal argument is that the challenged provisions violate the Commerce Clause under "dormant" Commerce Clause analysis. They argue that the regulations are per se invalid because they directly regulate interstate commerce and discriminate against foreign investors or, alternatively, that if a balancing test is applied the provisions are unconstitutional because they are unnecessary to protect Wisconsin utility consumers. Finally, because plaintiffs view the regulations as unnecessary, they argue that they lack a rational relationship to a state interest and therefore discriminate against foreign corporations in violation of the Equal Protection Clause.

Defendants contend that each challenged provisions is important to Wisconsin's compelling interest in regulating public utilities and, under appropriate legal standards, is constitutional. Defendants also suggest that plaintiff Alliant as a creation of the WUHCA is estopped from claiming that its restrictive provisions are unconstitutional.

The parties agree that no factual dispute precludes resolution of the entire matter on summary judgment. Should the Court perceive such a dispute the parties acquiesce in its resolution on the present record. Accordingly, the matter is indisputably ripe for resolution on the pending cross motions.

Commerce Clause Analysis

As is typical in challenges under the Commerce Clause the initial dispute concerns the standard by which the constitutionality of the challenged statute is determined. The Supreme Court has adopted a two tiered system for evaluating commerce clause challenges. If a statute regulates interstate commerce directly or is protectionist of in-state economic interests it is per se invalid. *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 653, 657 (7th Cir. 1995). However, if the statute is neutral on its face and impacts interstate commerce indirectly it is judged by the standard of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), *Id.*:

> Where the statute regulates evenhandedly, to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

While the division between the two tests has been described as depending upon the difference between "direct" and "indirect" regulation or whether the regulation is "evenhanded," the core concern in deciding which test to apply is whether the challenged statute constitutes economic protectionism. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994). Plaintiffs urge the Court to "apply the strict standard while defendants seek to apply the more lenient one.

The strict standard is clearly inapplicable to the challenged statutes. The general purpose of the challenged statutes is to

regulate local utilities which have state granted local monopolies, an area of regulation which seeks to protect local consumers and rate payers and obviously is not designed as protectionist legislation to discourage out of state competition. Indeed, such regulation is "one of the most important functions traditionally associated with the police powers of the states." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). No case cited by plaintiffs or discovered by the Court has applied the per se standard to local utility regulation.

The specific challenged statutes regulate the corporate structure and ownership of Wisconsin public utilities and restrict related entities in their non-utility investments. Such regulations have long been recognized as a legitimate and important component of local utility regulation. *Great Northern Ry. Co. v. State of Washington*, 300 U.S. 154, 160 (1937). The great potential for abuses by utility holding companies, including acquisition of risky investments and subsidiaries, exaction of unreasonable fees, issuance of unsound securities and others, which were the bases for federal regulation, *see North Am. Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 701-02 (1946), also support state restrictions on holding companies. While the statutes necessarily impact interstate commerce they do so only incidentally to the regulation of the local utility for the protection of local ratepayers. *Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408, 1422-23 (4th Cir. 1985); *Southern Union Co. v. Missouri Pub. Serv. Comm'n*, 2002 WL 850747 (8th Cir. 2002).

The statutory requirements that both Wisconsin utilities and corporations with a substantial ownership interest in them

be incorporated in Wisconsin, while arguably "facially discriminatory," are merely an extension of the structural regulation of local utilities. Wisconsin has required that local utilities be incorporated in state since 1907. The purpose of the requirement is to insure the complete ability to regulate the utility's conduct. *Calumet Service Co. v. City of Chilton*, 148 Wis. 334, 349, 135 N.W. 131, 137 (1912). The subsequent requirement that companies which hold a significant share in local utilities also be incorporated here is a logical extension of that purpose. Indeed, plaintiff Alliant candidly admits that it intends to incorporate elsewhere for the primary purpose of avoiding Wisconsin regulation. There is clearly no protectionist component to the requirement of the type which brings application of the per se rule of unconstitutionality. Quite the contrary as plaintiff Alliant points out, the effect of the requirement is to disadvantage Wisconsin utility holding companies in relation to their foreign counterparts.

Even cursory consideration of the cases relied upon by plaintiffs as support for a finding of per se invalidity reveals that they are not analogous. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court considered the constitutionality of Florida banking regulations which effectively precluded foreign bank holding companies from competing in the Florida market for investment advice services. The statutes were plain economic protection for local interests. No similar protectionism is present in the WUHCA. Other than the fact that both cases involved holding companies, there is no similarity.

Edgar v. Mite Corp., 457 U.S. 624 (1981), concerned a challenge to an Illinois law which directly regulated interstate

transactions in stock of non-Illinois corporations whenever 10% of shareholders were Illinois residents and 10% of stated capital and paid in surplus was represented in Illinois. The effect of the law was to regulate interstate stock transactions in shares of non-Illinois corporations between non-Illinois residents, an obviously impermissible intrusion on interstate commerce. Here, the challenged statutes affect only transactions in the stock of Wisconsin corporations in control of local utilities, an obviously incidental effect on interstate transactions properly analyzed under the *Pike* balancing approach.

The issue then is whether the burden imposed on interstate commerce by the challenged statutes is clearly excessive in relation to the local interest in regulating utility ownership and investment for the protection of rate payers. This task is much easier to state than to perform since the components to be balanced are not comparable. "It is more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia concurring).

Beginning with Wisconsin's interest in regulating the structure and ownership of local utilities, it has already been observed that this is a powerful and long recognized state interest. "The potential for abuse of public service companies, which are only 'legal' monopolies, are familiar and well documented." *Baltimore Gas*, 760 F.2d at 1424. Plaintiffs do not seriously dispute the compelling state interest protected by the challenged statutes, particularly the need to control the risk of deceptive financing practices, excessive service charges or rate increases to recoup poor financial decisions of the holding company. *See* plaintiff's support brief at 47,

response brief at 45. Rather plaintiffs argue that there are other unchallenged Wisconsin statutes which will protect those interests even if the challenged statutes are voided. Alternatively, plaintiffs suggest that their particular corporate structure renders the evils protected against unlikely to occur. Neither argument is persuasive.

Concerning the first argument plaintiffs suggest that defendants' extensive direct regulation of WPL insulates Wisconsin utility users from adverse effects because a regulatory barrier exists to prevent bad Alliant investments from crossing over to influence WPL rates. Accordingly, plaintiffs assert that there is no need for Wisconsin to concern itself with Alliant's activities outside Wisconsin or otherwise not directly related to the operations of WPL. This argument suffers from at least two defects. First, it is not at all clear that supervision of WPL is an adequate substitute for monitoring and limiting potentially risky investment activities by related entities. Given the complexity of internal accounting and the difficulty of insuring economic isolation between jointly owned companies, controlling initial investments and ownership may be more effective than trying to prevent investment losses from impacting WPL.

Second, even though plaintiffs' experts may testify that structural regulation is unnecessary, it is not the plaintiffs' place (or this Court's) to second guess the legislative conclusion to the contrary. It is not the role of a court to second guess judgments of lawmakers on the utility of legislation. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989). The restriction of which plaintiffs complain impose costs primarily on Wisconsin utilities and Wisconsin holding companies and

indirectly on their shareholders for the putative benefit of Wisconsin ratepayers, a legislative judgment of predominantly local concern. *Id. Baltimore Gas*, 760 F.2d at 1427. The state's interest in regulating holding company conduct which is potentially detrimental to a local utility is not substantially diminished by plaintiffs' opinion that other existing protections will serve as well. Wisconsin is entitled to impose both types of regulation if it deems necessary so long as the burden imposed on interstate commerce is not excessive.

Plaintiffs' suggestion that Wisconsin has little interest in the laws because Alliant has a corporate structure and policies to prevent the evils the statutes seek to prevent is even less substantial. Wisconsin need not consider such assurances of a particular party in assessing the need for legislation to prevent behavior which threatens the efficiency or reliability of public utilities. *North Am. Co.*, 327 U.S. 686, 710-11.

In conclusion, the local interest in regulating the ownership of utilities and the non-utility investments of holding companies is substantial, notwithstanding that the state may also enact restrictions which seek to isolate utilities from the ill-advised investments of related entities.

The second half of the analysis requires consideration of the burden imposed on interstate commerce by the regulations. There is no suggestion of an impact on commerce in electrical services, which are already monopolies isolated from competition and unaffected by the challenged statutes. Neither, as plaintiffs concede, is any reduction in Alliant's market value attributable to the regulations a relevant consideration in assessing the impact on interstate commerce. The impact on interstate commerce is twofold: Alliant is

limited in the amount of interstate investment it can make in non-utility assets and foreign corporations are dissuaded from acquiring a controlling interest in Alliant or WPL because an ownership interest large enough to trigger the statutes will subject foreign investors to the panoply of Wisconsin restrictions, including the requirement of Wisconsin incorporation. Neither appears to be a particularly significant intrusion into interstate markets.

While the investment cap may be a serious impediment to Alliant's business plans its effect on interstate commerce appears to be no more than negligible. Similarly, there is nothing to suggest that the effect of the regulations to discourage foreign takeovers of Wisconsin utilities or holding companies is a substantial impediment to interstate commerce. Foreigners are free to make substantial investments in plaintiffs' stock without concern for the restrictions so long as the investments do not exceed the applicable control percentage. Foreign investors can also acquire a controlling interest provided they submit to the same rigorous regulations imposed on plaintiffs. It has not been demonstrated that a single interstate transaction has actually been foreclosed by the challenged restrictions.

In any event, the restrictions on foreign investment are essential to Wisconsin's entitlement to fully regulate the ownership, control and operations of local utilities for the protection of its citizen rate payers. This compelling interest easily outweighs the minimal imposition on interstate commerce the regulations impose. Wisconsin would be free to enact an outright ban on utility holding companies. *Baltimore Gas*, 760 F.2d at 1427. Certainly, such a ban would impose far greater burden on interstate commerce that

the Wisconsin statutes challenged here. The power to forbid holding companies entirely surely encompasses the power to permit them with restrictions. *Amanda Acquisition*, 877 F.2d 496 (the power to forbid mergers necessarily includes the power to delay them). The statutes do not offend the Commerce Clause.

Equal Protection Clause

Plaintiffs' equal protection argument is premised Solely on the assertion that the challenged statutes discriminate against foreign corporations who wish to invest in local Wisconsin utilities. Plaintiffs' opposition brief at 48. It is a virtual restatement of their Commerce Clause argument. However, the standard for establishing a violation of the Equal Protection Clause based on discrimination against foreign competition is substantially higher than for establishing a Commerce Clause violation based on the same regulation.

> When local economic regulation is challenged solely as violating the Equal protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory determinations. Unless a classification trammels fundamental personal rights or is drawn on inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (citations omitted).

There is no question that the challenged statutes are rationally related to Wisconsin's interest in regulating the structure, ownership and investments of companies that control local utilities. There is also no question that limiting the riskiness of utility holding companies for the protection of those who depend upon and pay rates to its subsidiary utilities is a legitimate and powerful state interest. The statutes are not unconstitutional under Equal Protection analysis.

Estoppel

Even assuming the challenged statutes, or some of them, are deemed to violate the Constitution, defendants argue that plaintiffs could not prevail because they are estopped from raising the issue and because the relief they seek, declaration that the particular challenged provisions are unconstitutional and enjoining their enforcement, is unavailable. Specifically, defendants argue that Alliant may not challenge the law to which it owes its existence and that the WUHCA was enacted with the intent that utility holding companies be permitted in Wisconsin only subject to the countervailing restrictions imposed on them by the WUHCA. Accordingly, its restrictions may not be challenged independent of its enablement of holding companies.

An entity cannot challenge the constitutionality of the law to which it owes its existence. *Fahey v. Mallonee*, 332 U.S. 245 (1947). *Fahey* concerned a Constitutional challenge by a savings and loan to certain regulatory provisions of the act under which it obtained its charter. The Court reasoned:

> It would be intolerable that the Congress should endow an association with the right to conduct a

> public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of Corporate existence is estopped from questioning the validity of its vital conditions.

Id. at 256. There is no relevant difference between the circumstance of *Fahey* and those of Alliant.

Plaintiffs suggest that the doctrine is inapplicable because Alliant was a corporate shell before the WUHCA authorized it to be a holding company and does not technically "exist" because of the WUHCA. It does, however, owe its existence as a holding company to the Act. In order to become a holding company it was required to obtain a certificate of approval pursuant to Wis. Stat. 196.795(2). To suggest that the doctrine is overcome by the technical formation of a corporation is to ignore the basis for the doctrine.

Plaintiffs also rely on *North Am. Co. v. Securities and Exchange Comm'n*, 133 F.2d 148 (2d Cir. 1943). Apart from the fact that the case predates the Supreme Court's decision in *Fahey, North Am. Co.* is readily distinguishable on its facts. North American Company was a utility holding company operating as such since 1890 and owning some eighty utility companies in seventeen states. *Id.* at 150. With the enactment of the federal Public Utility Holding Company Act of 1935 (PUHCA) North American became subject to its restrictions and its registration requirements. It challenged certain provisions of the Act when it was faced with

enforcement. There is no suggestion that North American owed its existence to PUHCA. It had operated as a utility holding company for over forty years before the challenged law was enacted. Furthermore, although North American had registered pursuant to PUHCA, it did so while expressly preserving its right to challenge the constitutionality of the Act. *See North Am. Co.* 327 U.S. 686, 690 n.1 (1946).

Alliant did not exist as a utility holding company before the enactment of WUHCA. It lobbied and supported the adoption of the Act so that it could become a utility holding company. The Act reflects a legislative compromise, permitting utility holding companies to form but only under the strict requirements of the Act. Alliant is precluded by the doctrine of *Fahey* from forming under the Act and subsequently challenging the restrictions which were part of the bargain of its formation. Defendants argue that if the estoppel argument is accepted "WPLH, now Alliant Energy, would have been forced to choose never to exist, pursuant to Wis. Stats. sec. 196.795(2), or to live forever under the unconstitutional portions of WUHCA." Plaintiffs' reply brief at 19. That is not an argument against the application Of *Fahey*, but a restatement of its holding. Alliant is estopped from challenging selected restrictive provisions of the WUHCA to which it owes it existence as a holding company.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary is GRANTED.

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiffs' complaint and all claims contained therein with prejudice and costs.

Entered this 20th day of May, 2002.

BY THE COURT:

/s/ _____
JOHN C. SHABAZ
District Judge

APPENDIX D

CONSTITUTIONAL AND WISCONSIN STATUTORY PROVISIONS INVOLVED

Commerce Clause

The Congress shall have power

* * *

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

United Stated Constitution, Art. I, § 8, cl. 3.

Definition of Wisconsin Public Utility Holding Company

Public utility holding companies. (1) DEFINITIONS. In this section:

* * *

(h) 1. "Holding company" means any of the following:

a. Any company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities.

b. Any person which the commission determines, after investigation and hearing, directly or indirectly, exercises, alone or under an arrangement or understanding with one or more persons, such a controlling interest over the management or policies of a public utility as to make it necessary or appropriate in the public interest or for the protection of the utility's consumers or investors that such person be subject to this section.

Wis. Stat. § 196.795(1)(h)1.

In-State Incorporation Statute

(L) Any holding company which is incorporated shall be incorporated under ch. 180.

Wis. Stat. § 196.795(5)(L).

Takeover Statute

(3) TAKEOVERS. No person may take, hold or acquire, directly or indirectly, more than 10% of the outstanding voting securities of a holding company, with the unconditional power to vote those securities, unless the commission has determined, after investigation and an opportunity for hearing, that the taking, holding or acquiring is in the best interests of utility consumers, investors and the public. This subsection does not apply to the taking, holding or acquiring of the voting securities of any holding company existing before November 28, 1985, if such

holding company is a company which provides public utility service.

Wis. Stat. § 196.795(3).

Asset Cap

(6m) ASSET CAP. (a) *Definitions*. In this subsection:

1. "Contributor public utility affiliate" means a public utility affiliate that has contributed its transmission facilities to the transmission company under s. 196.485 (5) (b).

2. "Eligible asset" means an asset of a nonutility affiliate that is used for any of the following:

a. Producing, generating, transmitting, delivering, selling or furnishing gas, oil, electricity or steam energy.

b. Providing an energy management, conservation or efficiency product or service or a demand-side management product or service.

c. Providing an energy customer service, including metering or billing.

d. Recovering or producing energy from waste materials.

e. Processing waste materials.

f. Manufacturing, distributing or selling products for filtration, pumping water or other fluids, processing or heating water, handling fluids or other related activities.

g. Providing a telecommunications service, as defined in s. 196.01 (9m).

h. Providing an environmental engineering service.

3. "Foreign affiliate" means a person that is engaged in the production, transmission, delivery or furnishing of heat, light, power or natural gas either directly or indirectly to or for use of the public in another state, that is incorporated under the laws of another state, that is an affiliated interest, as defined in s. 196.52 (1), of a public utility and that is operated on an integrated system basis, as determined by the commission, with the public utility.

4. "Generation assets" means assets that are classified as electric generation assets on the books of account of a public utility, as determined by the commission.

5. "Reliability council area" means the geographic area that, on December 31, 1997, was served by the Mid-America Interconnected Network, Inc., Mid-Continent Area Power Pool, East Central Area

Reliability Coordination Agreement or Southwest Power Pool reliability council of the North American Electric Reliability Council.

6. "Wholesale merchant plant" means a wholesale merchant plant, as defined in s. 196.491 (1) (w), except that its location is not limited to this state, that is located in the reliability council area and that is owned, operated or controlled by an affiliated interest of a public utility.

(b) *In general.* 1. The sum of the assets of all nonutility affiliates in a holding company system of any holding company formed on or after November 28, 1985, may not exceed the sum of the following:

a. Twenty-five percent of the assets of all public utility affiliates in the holding company system engaged in the generation, transmission or distribution of electric power.

b. A percentage of the assets, as determined by the commission, which may be more, but may not be less, than 25% of all public utility affiliates in the holding company system engaged in providing utility service other than the generation, transmission or distribution of electric power.

c. For any public utility affiliate which is in the holding company system and which engages in the provision of more than one type of utility service, a percentage of assets equal to the amount of the public

utility affiliate's assets devoted to public utility service, other than the generation, transmission and distribution of electric power, multiplied by a percentage, as determined by the commission, which may be more, but may not be less, than 25%, plus 25% of all remaining assets of such public utility affiliate.

2. For purposes of subd. 1., the assets of each nonutility affiliate shall be determined by doing all of the following:

a. Subtracting from the nonutility affiliate's total assets the amount of the nonutility affiliate's investment in other utility and nonutility affiliates with which the nonutility affiliate is in a holding company system.

b. Multiplying the amount derived under subd. 2. a. by the quotient of the amount of the direct ownership interest in such nonutility affiliate owned by persons who are not with the nonutility affiliate in the holding company system, if such ownership by such persons is greater than one-half of the total ownership interest in such nonutility affiliate, divided by the total ownership interest in such nonutility affiliate.

c. Subtracting the amount derived under subd. 2. b. from the amount derived under subd. 2. a.

3. Within 36 months after it is formed, a holding company formed on or after November 28, 1985, may not have nonutility affiliate assets exceeding 40% of the maximum amount allowed under subd. 1.

4. If the commission establishes a percentage of assets under subd. 1. b. or c. which is greater than 25%, any subsequent reduction of such percentage by the commission may not take effect until the last day of the 12th month following issuance of the order establishing the reduction or until a later date which the commission sets and which the commission determines to be reasonable after considering the size of the reduction and which is no later than 36 months following issuance of the order establishing the reduction.

(c) *Wholesale merchant plants.* The assets of a wholesale merchant plant shall not be included in the sum of the assets of a public utility affiliate under par. (b) 1. a., b. or c. and shall not be included in a nonutility affiliate's total assets under par. (b) 2. a. if the requirements specified in s. 196.491 (3m) (a) 1. and 2. are satisfied or if the wholesale merchant plant qualifies for the exemption under s. 196.491 (3m) (e).

(d) *Foreign affiliates.* The assets of a foreign affiliate shall be included in the sum of the assets of a public utility affiliate under par. (b) 1. a., b. or c. and shall not be included in a nonutility affiliate's total assets under par. (b) 2. a.

(e) *Contributor public utility affiliates.* 1. The eligible assets of a nonutility affiliate in a holding company system that includes each of the contributor public utility affiliates in the holding company system shall not be included in the sum of the assets of the public utility affiliates under par. (b) 1. a., b. or c. and shall not be included in the nonutility affiliate's total assets under par. (b) 2. a.

2. For purposes of subd. 1., all of the assets of a nonutility affiliate shall be considered eligible assets if each of the following is satisfied:

a. The bylaws of the nonutility affiliate or a resolution adopted by its board of directors specifies that the business of the nonutility affiliate is limited to activities involving eligible assets.

b. Substantially all of the assets of the nonutility affiliate are eligible assets.

3. The net book value of transmission facility assets that a contributor public utility affiliate has contributed to a transmission company under s. 196.485 (5) (b) shall be included in the sum of the assets of the public utility affiliate under par. (b) 1. a., b. and c. In determining net book value under this subdivision, accumulated depreciation shall be calculated as if the contributor public utility affiliate had not contributed the assets.

4. The net book value of generation assets that a contributor public utility affiliate has transferred to a person that is not affiliated with the public utility affiliate pursuant to the order of the commission, a court or a federal regulatory agency shall be included in the sum of the assets of the public utility affiliate under par. (b) 1. a., b. and c. In determining net book value under this subdivision, accumulated depreciation shall be calculated as if the contributor public utility affiliate had not transferred the assets.

Wis. Stat. § 196.795(6m).

PSC Securities Regulation Statutes

(7) COMMISSION INVESTIGATIONS. (a) No sooner than the first day of the 36th month after the formation of a holding company and at least once every 3 years thereafter, the commission shall investigate the impact of the operation of every holding company system formed on or after November 28, 1985, on every public utility affiliate in the holding company system and shall determine whether each nonutility affiliate, except for the nonutility affiliates of a holding company that were affiliates of a holding company that was formed before November 28, 1985, does, or can reasonably be expected to do, at least one of the following:

1. Substantially retain, substantially attract or substantially promote business activity or employment or provide capital to businesses being formed or

operating within the wholesale or retail service territory, within or outside this state, of:

a. Any public utility affiliate.

b. Any public utility or member of a cooperative association organized under ch. 185 which reports or has reported information to the commission under the rules promulgated under s. 196.491(2) (ag).

2. Increase or promote energy conservation or develop, produce or sell renewable energy products or equipment.

3. Conduct a business that is functionally related to the provision of utility service or to the development or acquisition of energy resources.

4. Develop or operate commercial or industrial parks in the wholesale or retail service territory of any public utility affiliate.

Wis. Stat. § 196.795(7)(a).

Definitions. In this chapter, unless the context otherwise requires:

* * *

(2) "Public service corporation" means and embraces every corporation, except municipalities and other political subdivisions, which is a public utility as defined in s. 196.01, and every corporation which is

a railroad as defined in s.195.02, but shall not include a public utility corporation receiving an annual gross revenue of less than $1,000 for the calendar year next preceding the issuance of any securities by it. "Public service corporation" includes a holding company, as defined under s. 196.795 (1) (h), which is a public utility, as defined under s. 196.01 (5). "Public service corporation" does not include a telecommunications utility, as defined in s. 196.01 (10). "Public service corporation" does not include any other holding company unless the holding company was formed after November 28, 1985, and unless the commission has determined, under s. 196.795 (7) (a), that each nonutility affiliate, as defined under s. 196.795 (1) (j), does not and cannot reasonably be expected to do at least one of the items specified in s. 196.795 (7) (a). "Public service corporation" does not include a company, as defined in s. 196.795 (1) (f), which owns, operates, manages or controls a telecommunications utility, as defined in s. 196.01 (10), unless such company also owns, operates, manages or controls a public utility which is not a telecommunications utility. "Public service corporation" does not include a transmission company, as defined in s. 196.485 (1) (ge).

Wis. Stat. § 201.01(2) (underlining emphasis added).

Public Service Corporation Regulatory Statutes

Issue of securities. **(1)** No securities shall be issued by any public service corporation until it shall first

have obtained from the commission, and recorded upon its books a certificate authorizing such issue; and the commission shall not authorize the issuance of securities for any purposes which are not proper corporate purposes, or in an amount greater than is reasonably necessary for such corporate purposes, having in view the immediate requirements of the corporation and its prospective requirements over a reasonable period in the future, and other relevant considerations.

(2) All securities issued in violation of any of the provisions of this chapter shall be void.

Wis. Stat. § 201.03.

Securities. (1) APPLICATION TO ISSUE. Any public service corporation desiring to issue securities shall file with the commission an application verified by its president or vice president and its secretary or assistant secretary or by the signers of its articles of organization if it has not yet elected officers, setting forth:

(a) The amount and character of the proposed securities;

(b) The purposes for which they are to be issued;

(c) The terms on which they are to be issued, including a detailed description and a detailed statement of the value of any property or services that

are to be received in full or partial payment therefor, and of any property or services already received by the corporation, the cost of which is to be reimbursed to the corporation by the proceeds of such securities; and

(d) A statement of the assets and liabilities of the corporation as of the most recent available date, together with such further financial information as the commission may require.

(2) HEARINGS AND INQUIRIES. In order to determine whether the proposed issue complies with the provisions of this chapter, the commission may make such inquiry or investigation, hold such hearings, and examine such witnesses, books, papers, documents or contracts, as it may deem material. It shall determine the value of any property or services for which the securities, in whole or in part, are to be issued. It may also make a valuation, in detail, of all property of the corporation and may determine the full amount of its liabilities if deemed pertinent.

(3) VALUATION OF FRANCHISES. In determining the value of property under this chapter, no franchise to be a corporation and no franchise or privilege granted to a corporation shall be appraised at more than the sum paid therefor to the state or municipality granting the same.

(4) CLASSES PROPORTIONATE. The amount of securities of each class which any public service

corporation may issue shall bear a reasonable proportion to each other and to the value of the property, due consideration being given to the nature of the business of the corporation, its credit and prospects, the possibility that the value of the property may change from time to time, the effect which such issue will have upon the management and operation of the corporation by reason of the relative amount of financial interest which the various classes of stockholders will have in the corporation, and other considerations deemed relevant by the commission. The provisions of this subsection shall not apply to common stock issued by a public service corporation which has issued or proposes to issue its notes, bonds or other evidences of indebtedness to the United States of America in connection with loans for rural telecommunications facilities made pursuant to the rural electrification act of 1936, as amended.

Wis. Stat. § 201.05.

Certificate of authority, impounding securities. (1) (a) Upon the conclusion of its investigation, if the commission shall find that the proposed issue complies with the provisions of this chapter and that the financial condition, plan of operation and proposed undertakings of the corporation will afford reasonable protection to purchasers of the securities to be issued, the commission shall issue to the corporation a certificate of authority stating all of the following:

1. The amount of securities reasonably necessary and the character of the securities.

2. The purposes for which the securities are to be issued in such detail as the commission may consider necessary.

3. The terms on which the securities are to be sold or otherwise disposed of, including a description and a determination of the value of any property or services to be received in partial or full payment therefor.

(b) A corporation shall not issue the securities on any other terms or for any other purposes than that stated in the certificate issued under par. (a).

(c) If any portion of the securities authorized by the certificate are evidences of indebtedness which are to be pledged to secure lawful obligations of the applicant, the commission in its certificate shall state the minimum price at which the securities may be sold in the event of any enforcement of the pledge. If the purpose of the issue is, in whole or in part, to provide funds for properties to be constructed or acquired, the commission may, if it finds that the public interest so requires, require the applicant to impound the proceeds of the securities, or furnish suitable bonds to guarantee the completion of the project, under conditions that the commission finds to be reasonable and specifies in the certificate.

(2) The commission may attach to the issuance of any certificate under this chapter such terms, conditions or requirements as in its judgment are reasonably necessary to protect the public interest. Any public service corporation dissatisfied with any of the terms or conditions so imposed by the commission in such certificate of authority shall be limited in its remedy to an action to modify or set aside the commission order authorizing a certificate of authority, as provided by s. 201.08. Any public service corporation issuing securities pursuant to any certificate of authority, not having brought any such action to set aside such order shall be deemed thereby to have waived any and all objections to the terms, conditions and requirements contained in such certificate of authority.

Wis. Stat. § 201.06.

Penalties. (1) Any public service corporation, or any agent, director or officer of a public service corporation, who shall directly or indirectly, issue or cause to be issued, any securities for whose issuance a certificate is required contrary to the provisions of this chapter, or who shall apply the proceeds from the sale of the securities to any purpose other than that specified in the certificate of the commission, shall forfeit to the state not less than $500 nor more than $10,000 for each offense.

(2) Every director, president, secretary or other official or agent of any public service corporation,

who shall practice fraud or knowingly make any false statement to secure a certificate of authority to issue any security, or issue under a certificate so obtained and with knowledge of such fraud, or false statement, or negotiate, or cause to be negotiated, any security, in violation of this chapter, is guilty of a Class I felony.

Wis. Stat. § 201.09.

Impaired capital. Whenever the commission shall find that the capital of any public service corporation is impaired it may, after investigation and hearing, issue an order directing such public utility to cease paying dividends on its common stock until such impairment has been made good. Nothing in this section shall be construed to modify the requirements of ss. 180.0623 and 180.0640.

Wis. Stat. § 201.11.

Stock. Subject to the regulatory jurisdiction of the commission under this chapter and to all other applicable provisions of law relating to railroad or other special types of corporations, all classes and series of stock of a public service corporation shall be governed by the provisions of ch. 180.

Wis. Stat. § 201.13.